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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

NO. 618

ALABAMA POWER COMPANY,

Petitioner,

v.

ALABAMA ELECTRIC COOPERATIVE, INC., a corporation; RURAL ELECTRIFICATION ADMINISTRATION; NORMAN M. CLAPP, Administrator of the Rural Electrification Administration; THE UNITED STATES DEPARTMENT OF AGRICULTURE; and ORVILLE L. FREEMEN, Secretary of the United States Department of Agriculture,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The antitrust laws are being frustrated by a denial to injured parties of access to the courts. Hence, Alabama Power Company, a corporation organized under the laws of the State of Alabama, is here petitioning for a writ of certiorari to review the decision and judgment of the United States Court of Appeals for the Fifth Circuit entered in the above styled case on

April 2, 1968, and to review the order of such court entered on July 11, 1968, denying petitioner a rehearing.

OPINIONS BELOW

The majority and minority opinions of the United States Court of Appeals for the Fifth Circuit (R 320-366) are reported at 394 F.2d 672-692. Such opinions, together with the judgment entered thereon (R 368) and the order denying petition for rehearing (R 469), are appended hereto as Appendix A. The opinion of the United States District Court for the Middle District of Alabama (R 299-309) is reported at 249 F. Supp. 855. Such opinion and the order entered thereon (R 309) are appended hereto as Appendix B.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit sought to be reviewed was made and entered April 2, 1968 (R 368). Petition for rehearing was timely filed on April 23, 1968 (R 369-414). Such petition for rehearing was denied July 11, 1968 (R 469). Issuance of mandate was stayed until August 17, 1968, by order entered July 17, 1968. Issuance of mandate was again stayed until October 9, 1968, by order entered July 16, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED FOR REVIEW

Alabama Power Company's suit in the district court was filed, *inter alia*, under Section 16 of the Clayton Act (15 U.S.C. § 26 and Appendix C, page 61a) seeking to enjoin certain

violations of the antitrust laws alleged to have occurred when Alabama Electric Cooperative, Inc., an Alabama corporation, entered into numerous 35 year, all-requirements, exclusive dealing contracts for the sale of electric power to customers and potential customers of Alabama Power Company. These contracts provide for the sale of all electric power consumed in a vast geographic area of the State of Alabama and have the effect of foreclosing Alabama Power Company and others from the opportunity to sell electric power in a substantial market area. The Administrator of the Rural Electrification Administration ("REA") was an active participant in such contracts and is alleged to have applied coercion to accomplish the signing of the contracts. The district court dismissed the suit without a hearing on the merits on the ground that Alabama Power Company lacks standing to sue. The Court of Appeals, by a divided vote, affirmed such dismissal. The questions presented are:

1. Does Alabama Power Company have standing under Section 16 of the Clayton Act (15 U.S.C. § 26) to sue Alabama Electric Cooperative, Inc. (a private corporation organized under the laws of Alabama) to enjoin its violations of the antitrust laws by entering into numerous 35 year, all-requirements, market foreclosure, electric power contracts executed with customers and potential customers of Alabama Power Company where such contracts (a) forbid such customers from purchasing from Alabama Power Company, (b) require such customers to purchase only from Alabama Electric Cooperative, Inc., and (c) effectively deny to Alabama Power Company for 35 years one-third of the State of Alabama as a market area?

2. Does Alabama Power Company have standing under Section 16 of the Clayton Act (15 U.S.C. § 26) or under the rule most recently confirmed in *Hardin v. Kentucky Utilities Company*, ____ U.S. ____, 19 L. Ed. 2d 787 (Case No. 40 decided January 16, 1968), or under Section 10(a) of the Administrative Procedure Act (5 U.S.C. § 702) to challenge or review in the federal courts actions of the REA Administrator which were part of a conspiracy to violate the antitrust laws?

3. Is Alabama Electric Cooperative, Inc. (a private corporation organized under the laws of Alabama) an instrumentality of the United States?

4. Has Alabama Electric Cooperative, Inc. (a private corporation organized under the laws of Alabama) received immunity from the antitrust laws either by Congressional act or through the REA Administrator as a conduit so that Alabama Power Company (an injured competitor of Alabama Electric Cooperative, Inc.) has no standing under the antitrust laws to challenge in the federal courts numerous 35 year, all-requirements, market foreclosure, electric power contracts extracted by Alabama Electric Cooperative, Inc. from customers and potential customers of Alabama Power Company?

5. Was Alabama Power Company entitled to a hearing on the merits to determine whether the Administrator of REA was acting beyond the outer perimeter of his authority when, as an alleged active participant in a conspiracy to deprive Alabama Power Company of one-third of the State of Alabama as a

market area, he assisted Alabama Electric Cooperative, Inc. in coercing numerous customers and potential customers of Alabama Power Company into signing 35 year, all-requirements, exclusive dealing, market foreclosure, electric power contracts with Alabama Electric Cooperative, Inc.?

6. Does the complaint state against any of the defendants a claim which Alabama Power Company had standing in the federal courts to pursue?

STATUTES INVOLVED

Pertinent parts of Sections 1 and 2 of the Sherman Antitrust Act (15 U.S.C. §§ 1 and 2), of Sections 3 and 16 of the Clayton Act (15 U.S.C. §§ 14 and 26), of Section 10(a) of the Administrative Procedure Act (5 U.S.C. § 702)[1] and of Section 4 of the Rural Electrification Act of 1936 (7 U.S.C. § 904) are set forth as Appendix C.

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[1] Section 10(a) of the Administrative Procedure Act of 1946, formerly codified in 5 U.S.C. § 1009, was included in Pub. L. No. 89-554 (Sept. 6, 1966), 80 Stat. 378, entitled "Government Organization and Employees." Such Pub. L. No. 89-554 accomplished a complete revision of Title 5 of the United States Code. Former § 1009 (Section 10(a) of the Administrative Procedure Act of 1946) is now § 702 of Title 5. In this petition it will be referred to as 5 U.S.C. § 702 or as Section 10(a) of the Administrative Procedure Act.

STATEMENT OF THE CASE

Statement of facts[2]

Alabama Power Company is a regulated public utility authorized by Alabama law to provide electric power in fifty-five Alabama counties in which it operates pursuant to nonexclusive franchises. These counties comprise the entire state of Alabama except the northern few counties which are in the area served by the Tennessee Valley Authority (R 3, 281). Alabama Power Company has invested over one billion dollars in its electric facilities to enable it to provide such electric power. At the time it filed its complaint in the district court, Alabama Power Company was selling electric power at wholesale to many customers, including twelve of the fourteen rural electric distribution cooperatives operating within such fifty-six counties (R 4-5, 282-283).

Alabama Electric Cooperative, Inc. is a private corporation organized under the laws of the State of Alabama and is engaged in generating and transmitting electric power which it sells primarily at wholesale for resale. It is a competitor of Alabama Power Company. At the time the complaint was filed in this case, a substantial portion of the sales by Alabama Electric Cooperative, Inc. were being made to five of the same fourteen rural electric distribution cooperatives for whose

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[2] Since the district court dismissed this case on motion of the defendants without a hearing, the allegations in the complaint, both in the court below and in this Court, must be taken as true. As stated by Circuit Judge Godbold: "The complaint—and at this stage we take its allegations as true—sets out a classic case of an exclusive supply contract which violates Section 3 of the Clayton Act because it forecloses in the relevant market a substantial share of the line of commerce affected." (394 F.2d 672, 679 and Appendix A, pages 16a-17a)

business it competes with Alabama Power Company. In addition, Alabama Electric Cooperative, Inc. sells at wholesale to a rural distribution cooperative in northwest Florida (in competition with Gulf Power Company) and to four municipalities in Alabama. It also sells at retail to two textile industries in Alabama (R 2-5, 282-287).

The resale by the fourteen rural electric distribution cooperatives, for whose business Alabama Power Company and Alabama Electric Cooperative, Inc. compete, constitutes a substantial portion of all sales of electric power in a substantial geographic area of the State of Alabama (R 295).

In 1960, Alabama Electric Cooperative, Inc. entered into 35 year, all-requirements, exclusive dealing, wholesale power supply contracts with most, if not all, of these fourteen rural electric distribution cooperatives. The complaint in this case alleges that these 35 year requirements contracts are unlawful. They are part of an overall conspiracy to eliminate from the electric market available to Alabama Power Company at least one-third of the rural areas of the State of Alabama for the balance of the twentieth century and thereby to restrain trade by contract in violation of the antitrust laws (R 10-13, 285-288, 293-298).

The Administrator of REA was an active participant in this conspiracy and "used the power and prestige of his office and position to coerce such distribution cooperatives into executing such illegal contracts" (R 12). All these distribution cooperatives, which are also private corporations organized under the laws of Alabama, are dependent upon REA for funds and are readily subject to pressure and coercion from the Administrator.

In 1961, in furtherance of such conspiracy, the REA Administrator authorized a $20,350,000 loan to Alabama Electric Cooperative, Inc. to enable it to construct facilities to supply electric power in implementation of certain of such 35 year contracts. The electric power to be supplied by such new facilities would supplant "central station service" then being supplied by Alabama Power Company (R 8-9) notwithstanding the limitation in Section 4 of the Rural Electrification Act of 1936, 7 U.S.C. § 904 (Appendix C, page 61a), which prohibits loans for the purpose of furnishing electric power to persons already receiving central station service. The Administrator was a party to the 35 year contracts *between* private Alabama corporations which are alleged to be proscribed by the antitrust laws and the Administrator's commitment to grant such loan was conditioned upon the execution of such contracts (R 11-13).

Alabama Power Company filed a complaint in the United States District Court for the Middle District of Alabama (R 1-33) against Alabama Electric Cooperative, Inc. to enjoin such unlawful 35 year contracts, *expressly alleging standing to sue under Section 16 of the Clayton Act*, 15 U.S.C. § 26.[3] Several governmental defendants, primarily the Administrator of REA, were also included in the suit. The complaint also sought a declaration that the 35 year contracts, being in violation of the antitrust laws, were void and sought to review the loan itself to the extent that it was predicated on such 35 year contracts and to the extent that it was otherwise unlawful.

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[3] 15 U.S.C. § 26, provides: "Any person, firm, corporation or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws . . . ."

The District Court decision

Notwithstanding (a) the *express* provisions of Section 16 of the Clayton Act giving standing to sue to *anyone* threatened with damage by antitrust violations, (b) the fact that defendant Alabama Electric Cooperative, Inc. was a private Alabama corporation, (c) the fact that the contracts were *between private Alabama corporations* and were alleged to constitute an unlawful restraint upon trade, (d) the allegations of coercion by the Administrator as an active co-conspirator, and (e) the allegations of facts showing that the Administrator acted *beyond* the scope or outer perimeter of his authority, the district court, on motion of the defendants, dismissed the suit as to all parties (R 309 and Appendix B, page 58a), having first denied Alabama Power Company the opportunity to take the deposition of the Administrator to lay open the conspiracy (R 40-41). The district court, in dismissing the case as to *all* defendants without a trial on the merits as to *any* defendant, made no findings of fact but predicated its dismissal on what it understood to be the absence of *any* standing of Alabama Power Company to maintain the suit (R 299-309 and Appendix B, pages 47a through 57a).

The Court of Appeals decision

The Circuit Court of Appeals for the Fifth Circuit affirmed the dismissal of the case by the district court (R 320-368 and Appendix A, pages 1a-45a). Circuit Judge Godbold wrote an extensive dissenting opinion in which he strongly disagreed with the majority opinion (R 331-366 and Appendix A, pages 12a-45a).

The majority opinion recognized that, if the REA Administrator went beyond the outer perimeter of his authority by his participation in the antitrust violations, he might lose his immunity and Alabama Power Company might have standing to sue. Notwithstanding this recognition, such opinion summarily denied a hearing to determine factual issues directly bearing on whether such outer perimeter had been exceeded. The dissenting opinion emphatically stated that the pleadings, affidavits and exhibits "squarely raise a factual issue of whether the Administrator is acting within or without his outer limits" (394 F.2d 672, 685 and Appendix A, pages 29a-30a) and described the majority's holding as the coupling of "a privilege for acts done within the perimeter with immunity from judicial investigation of where the perimeter lies," thus expanding "the privilege into immunity for any act done" (394 F.2d 672, 686 and Appendix A, page 30a). Neither the district court nor the majority opinion below reached the issue of whether the 35 year contracts are proscribed by the antitrust laws. As stated in the dissenting opinion (Appendix A, pages 16a-17a):

> "... They simply decline to scrutinize them. The complaint—and at this stage we take its allegations as true—sets out a classic case of an exclusive supply contract which violates Section 3 of the Clayton Act because it forecloses in the relevant market a substantial share of the line of commerce affected. ..." (394 F.2d 672, 679)

The majority opinion failed to consider the standing to sue expressly conferred upon Alabama Power Company by Section 16 of the Clayton Act, 15 U.S.C. § 26 (Appendix C, page 61a). Indeed the opinion did not even cite the statute or refer to the

suit having been filed thereunder. The dissenting opinion expressly found standing to sue under such Section 16 of the Clayton Act.

Even though the only relation of Alabama Electric Cooperative, Inc. to the United States is that of a borrower of REA funds, the majority opinion held Alabama Electric Cooperative, Inc. to be an instrumentality of the United States. The effect of such a holding would convert into "instrumentalities of the United States" (Appendix A, page 11) other authorized borrowers of REA funds, including "persons, corporations, States, Territories, and subdivisions thereof, municipalities" (Section 4 of the Rural Electrification Act, 7 U.S.C. § 904).

Both the majority opinion and the dissenting opinion expressly recognized that this case presented unique and serious questions of exceptional importance heretofore unanswered by the courts. As stated in the majority opinion (Appendix A, page 10a):

> "Finally, a unique question presented by the Power Company must be answered. This is the first of the attacks by private power companies on federal loans to competitors in which there has been a *separate* attack on the borrower and those alleged to be in conspiracy with it for claimed violation of the antitrust laws. It is argued that there is nothing in the Act or in its legislative history which authorizes the Administration [sic] to grant immunity to the borrower, AEC, and that at the very least the plaintiff has a right to pursue its antitrust suit against AEC. . . ." (394 F.2d 672, 676-677)

The dissenting opinion expressed it as follows (Appendix A, page 12a):

> *"This case presents in bold and clear form issues not heretofore judicially determined* of the interplay between, on the one hand, the antitrust laws and the national policy which they represent and, on the other hand, the Rural Electrification Act and national policies of aid to rural citizens without electric service. *In addition there are vital factual issues which have been neither determined nor reached,* since the decision below was a dismissal for lack of standing to sue." (Emphasis supplied) (394 F.2d 672, 677)

Petition for rehearing was duly filed (R 369-414), which petition was denied in a divided opinion rendered July 11, 1968 (R 469 and Appendix A, page 46a). Alabama Power Company has thereby been denied a hearing on the merits to scrutinize the monopolistic 35 year contracts and the unlawful conspiracy of which they are a part.

REASONS FOR GRANTING THE WRIT

Reason I: **An important question of federal law which has not been, but should be, settled is involved in this case.**

"This case presents in bold and clear form issues not heretofore judicially determined of the interplay between, on the one hand, the antitrust laws and the national policy which they represent and, on the other hand, the Rural Electrification Act and national policies of aid to rural citizens without electric

service." Dissenting opinion of Circuit Judge Godbold, 394 F.2d 672, 677 and Appendix A, page 12a.

"This is the first of the attacks by private power companies on federal loans to competitors in which there has been a separate attack on the borrower and those alleged to be in conspiracy with it for claimed violation of the antitrust laws." Majority opinion, 394 F.2d 672, 676 and Appendix A, page 10a.

It is perfectly clear from the foregoing that "an important question of federal law which has not been, but should be, settled" is involved in this case (Rule 19, Rules of the Supreme Court of the United States).

This is the first case bringing into focus the interplay between the Rural Electrification Act and the antitrust laws. It raises the question as to whether a private corporation, as a *borrower* of REA funds, enjoys immunity from the antitrust laws and can thus enter into contracts which are classic violations of such laws. The court below has fashioned such immunity, the far-reaching implication of which was noted in the minority opinion (Appendix A, page 25a):

> "... It boggles the imagination to suggest that the myriad of government agencies having the power to lend (each based on Congressional determination that the particular lending power authorized is in the national interest) are, by reason of routine administrative control over sufficiency of collateral, vested with implied power to carve out of the national economy exempt enclaves in which borrowers may deal free of the antitrust laws." (394 F.2d 672, 683)

The practice of using such monopolistic contracts as security for loans has never been challenged in the courts and is likely to continue so long as it is clothed with immunity from attack. Indeed, the affidavit of the REA Administrator filed in the district court states "It has been the practice for many years of REA Administrators, including the affiant, to require as a condition of making generating and transmission loans pursuant to Section 4 . . . that the borrower shall obtain 35 year contracts" (R. 226). Such practice is a matter of far-reaching and serious consequence upon which this Court should focus. Such practice, if allowed to continue unbridled and insulated by the immunity from the antitrust laws which the court below has fashioned, will result in a large segment of the consumers of electric power throughout the nation becoming the ultimate victims of an ever-increasing monopoly.

A brief reference to the *1966 Annual Statistical Report* of the Rural Electrification Administration [4] shows that as of December 31, 1966, there were 993 active borrowers from REA. Of this number, 927 were electric cooperatives. As of such date, more than 5,650,000 electric consumers were served by active REA borrowers. These consumers purchased more than 45 *billion* (45,000,000,000) kilowatts of electric energy in 1966 and were located in 46 different states and in Puerto Rico and the Virgin Islands.

The proportion of loans being made by the REA Administrator to so-called "power supply borrowers," such as Alabama Electric Cooperative, Inc. in this case, for generating and transmission purposes as distinguished from distribution purposes, has been at a high level for several years despite the fact that virtually all of the United States has electric power

[4] REA Bulletin 1-1, at pages 5-11, published in August, 1967, by the United States Department of Agriculture.

generated from central station generators. REA loans approved under Section 4 of the Rural Electrification Act for fiscal years 1962-1966 amounted to $1,555,591,000. Of this amount, more than half, $858,908,000, was for generating and transmission facilities.[5] Moreover, "power supply borrowers" are producing an increasing proportion of all electric power marketed by REA borrowers. The *28th Annual Report of Energy Purchased by REA Borrowers Fiscal Year Ended June 30, 1966* (REA Bulletin 111-2, at page 7) shows that such proportion increased from 12.8% in 1950 to 19.6% in 1966. Thirty-five year contracts similar to the ones involved in this case have doubtlessly contributed greatly to this growth.

Thus, this Court should recognize that judicial inquiry should not end simply because it has been the practice of REA Administrators to require 35 year, all-requirements contracts as a condition to making generating and transmission loans. It is respectfully submitted that such practice is destined to carve out larger and larger segments of the electric power market in which increasing numbers of ultimate consumers will be tied to a system of wholesale power supply which by contract excludes existing utilities and forecloses them from an opportunity to compete for this growing market.[6]

Such practice of the Administrator was put in proper perspective in the dissenting opinion (Appendix A, page 16a):

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[5] Page 1094, transcript of hearings before the Subcommittee of the Committee of the United States Senate on Appropriations for the Department of Agriculture, 90th Congress.

[6] See *Pennsylvania Water & Power Co. v. Consolidated Gas, Electric Light & Power Co.*, 184 F.2d 552, 558 (4th Cir. 1950), *cert. denied*, 340 U.S. 906, where the Fourth Circuit held that an electric power agreement "which forecloses competitors from a substantial market" violates the Sherman Act.

> "... There is no right by prescription to violate the antitrust laws. This theory that governmental action can bootstrap itself to a state of validity is expressly adopted by the majority, who conclude that in making the contracts the Administrator was not beyond the outer perimeter of his authority because he was 'doing nothing unusual, but was simply following customary and long-established REA practice.' " (394 F.2d 672, 679)

The complaint sets forth contracts of a character which the courts have traditionally banned as violative of the antitrust laws. As an injured party, petitioner is expressly given standing to sue by Section 16 of the Clayton Act, 15 U.S.C. § 26 (Appendix C, page 61a). This case thus squarely presents the issue of whether Congress granted immunity from the antitrust laws by the Rural Electrification Act to REA borrowers and to those with which they contract.

Reason II: **The opinion below decided a federal question in conflict with applicable decisions of this Court.**

The Rural Electrification Act of 1936, 7 U.S.C. §§ 901, et seq., does not expressly grant immunity from the antitrust laws *to borrowers* of REA funds nor *to the Administrator* of REA. Moreover, there is nothing in the Rural Electrification Act of 1936 from which a congressional intent to grant such immunity is manifestly implied. Nevertheless the majority opinion below grants an *implied* immunity to *each* of the defendants. This *implied* immunity is in conflict with *California v. Federal Power Commission*, 369 U.S. 482 (1962):

> "Immunity from the antitrust laws is not lightly implied. . . ." (p. 485)

and in conflict with *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963):

> ". . . Repeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions." (pp. 350, 351)

The majority opinion below concluded that the provisions of Section 4 of the Rural Electrification Act of 1936, 7 U.S.C. § 904 (Appendix C, page 61a), which authorize the REA Administrator to determine the "terms and conditions" of the security for an REA loan, grant an immunity from the antitrust laws. It held that such Section 4 empowers the Administrator to accept 35 year, exclusive dealing contracts as security for a loan even though such contracts violate the antitrust laws. The opinion reasoned that "Anything less might well mean the acceptance of inadequate security" (394 F.2d 672, 676 and Appendix A, page 9a).

The legislative history of the Rural Electrification Act of 1936 clearly demonstrates congressional intent not to authorize REA loans for the purpose of competing with existing public utilities.[7] Opinions by two separate Solicitors of the Department of Agriculture state that the debates in Congress and committee hearings demonstrate that Congress sought to

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[7] See legislative history of the Rural Electrification Act cited in footnote 17 of the dissenting opinion of Circuit Judge Godbold, 394 F.2d 672, 683 and Appendix A, page 26a.

prevent such competition.[8] Nevertheless, the majority opinion below holds that Congress impliedly authorized not only competition with existing public utilities but also a *foreclosure* of the opportunity of an existing utility to compete with an REA borrower. Such authority was found by the provisions of Section 4 of the Act permitting the Administrator to set the "terms and conditions" of the security for a loan. But the "terms and conditions" contemplated by Congress were *lawful* terms and conditions such as would be consistent with the "charter of economic liberty" contained in the antitrust laws. Congress doubtless intended the security to be mortgages, deeds of trust, pledges of collateral, assignments of accounts receivable and other "lawful" forms of security. Congress certainly did not intend to grant immunity from the antitrust laws and thereby foreclose competition from existing public utilities such as Alabama Power Company.

Resort to the legislative history is not necessary to determine that the intent of Congress was to avoid the creation of competition with existing utilities. Such intent is expressed in

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[8] "... Practically the entire debate on the limiting clause [the central station service limitation] here under discussion centered about the question of competition. It seems clear from the legislative history that the intent of the limitation was to prevent loans that would create federally financed competition with existing utility enterprises. ...

"Where the effect of a proposed loan, regardless of its essential purpose, would be to substitute a competitive REA-financed service to persons already served, the loan may not be made...." (Opinion No. 4506 by Robert H. Shields, Solicitor of the Department of Agriculture, dated November 24, 1942)

"Congressional debates and committee hearings contain frequent references to the clause in question [the central station service provision]; but, as has been noted, these discussions were generally concerned with the question of competition ... This distinction serves to emphasize the point that the interest of Congress, in this provision, was to prevent competition with established utilities." (Opinion No. 5427 by W. Carroll Hunter, Solicitor of the Department of Agriculture, dated November 3, 1948)

Section 4 of the Rural Electrification Act of 1936, 7 U.S.C. § 904 (Appendix C, page 61a), by the provision limiting loans to provide electric power "to persons in rural areas who are not receiving central station service." As stated by Circuit Judge Godbold in his dissenting opinion:

> "It is beyond question that the purpose of the central station service provision of § 904 was to give private utilities some measure of protection from competition created as a result of REA loans. Protection from lawful competition of REA-financed borrowers has been held not a constitutional entitlement and a matter for relief solely in Congress. But it flies in the teeth of the Congressional intent expressed in § 904—protection of private utilities from a described area of competition—to distill the same § 904 into an authorization to the Administrator to require, with impunity and immunity, action that freezes out the private utility as a competitor. By some unrevealed process of alchemy the partial shield given the private utility against the REA borrower by § 904 is converted into a sword in the borrower's hands." (394 F.2d 672, 683-684 and Appendix A, pages 25a-26a)

It therefore follows that Congress did not intend by the Rural Electrification Act to grant immunity from the antitrust laws. The holding below which attributes by implication an antitrust immunity to the provisions of such Act is erroneous and in conflict with *California v. Federal Power Commission*, 369 U.S. 482 (1962), and *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963). Moreover, such decision passes any

immunity which the Administrator of REA might enjoy down to Alabama Electric Cooperative, Inc. (an Alabama corporation) and to those with which Alabama Electric Cooperative, Inc. contracts. It is therefore also in conflict with *Keifer & Keifer v. Reconstruction Finance Corporation*, 306 U.S. 381 (1939). For if after a full hearing of the evidence it were found that the REA Administrator acted within the outer perimeter of his authority[9] and he is thereby given some form of immunity, he still cannot serve as a conduit through which such immunity can be passed to others. *Keifer & Keifer v. Reconstruction Finance Corporation, supra.*

Reason III: The decision below is in conflict with the recent decision of the United States Court of Appeals for the District of Columbia in *City of Paris v. Federal Power Commission*, decided July 18, 1968.

The status of borrowers of REA funds, whether such borrowers are (a) electric cooperatives organized as private corporations under state law, (b) other private corporations, (c) municipal corporations, or (d) other authorized borrowers, presents an important question not heretofore determined by this Court. The decision below has held that Alabama Electric Cooperative, Inc., a rural electric cooperative organized as a private corporation under the laws of Alabama, *is an instrumentality* of the United States (394 F.2d 672, 677 and Appendix A, page 11a). Such decision is in *direct conflict* with

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[9] This is a much controverted question of fact which petitioner was not afforded the opportunity to have judicially determined since the complaint was dismissed without a hearing.

the decision of the Court of Appeals for the District of Columbia Circuit decided July 3, 1968, in *City of Paris v. Federal Power Commission,* Case Number 21,375. The *City of Paris* decision expressly held that rural electric cooperatives which borrow REA funds *are not government instrumentalities:*

In reaching the decision that rural electric cooperatives are instrumentalities of the United States, the court below seems to have confused the Rural Electrification Administration (which is obviously an instrumentality of the United States) with the countless rural electric cooperatives organized as separate corporations under the laws of the respective states (394 F.2d 672, 677 and Appendix A, page 11a). It relied upon a Federal Power Commission decision (*Dairyland Power Cooperative*, 37 F.P.C. 12, 35 L.W. 2385) and a decision of the Court of Appeals for the District of Columbia (*Salt River Project Agricultural Improvement & Power District v. F.P.C.*, 391 F.2d 470).

In the *City of Paris* case, *supra,* the Court of Appeals for the District of Columbia noted that the *Dairyland* decision was never directly subjected to judicial scrutiny and noted further that in the *Salt River* case the Court of Appeals for the District of Columbia had "carefully avoided reaching the question whether REA-financed cooperatives" are government instrumentalities (page 5 of the slip opinion of July 3, 1968, Case Number 21,375, United States Court of Appeals for the District of Columbia Circuit). In the *City of Paris* case the court faced such question for the first time and held that rural electric cooperatives are *not* instrumentalities of the government. In so holding, the Court of Appeals for the District of Columbia stated:

"It is true that the Rural Electrification Act was an attempt by Congress to bring economical electric power to rural areas through rural electrification cooperatives, and that the Rural Electrification Administration, which makes low-interest loans to such incipient cooperatives, does exercise considerable supervision over them. But this connection with the REA is not, we think, of such magnitude as to make the cooperative borrowers instrumentalities of the federal government. The cooperatives do not perform an inherent governmental function, nor have they become so assimilated or incorporated into government as to become one of its constituent parts. The funds advanced to the cooperatives are not spent or used on behalf of government or in the performance of any governmental function. The benefits of the loan inure primarily to the cooperatives' constituent members. That the public interest in rural electrification is also served thereby is not enough to make the cooperatives themselves instrumentalities.

"REA-financed cooperatives are private nonprofit corporations organized for the benefit of their consumer-owners. They are neither operated nor controlled by any government, federal, state or local. Nor are they operated or controlled by the Rural Electrification Administration or any other government agency. The control and authority exercised over them by the REA relates primarily to the REA loan and the protection of the United States' security interest in the cooperatives' operations. But the voluntarily entered contract with REA does not,

we think, alter the nature of the cooperatives' independent corporate existence. 'The control reserved by the Government for protection of a governmental program and the public interest is not incompatible with the retention of the status of a private enterprise.' *Buckstaff Bath House Co. v. McKinley*, 308 U.S. 358, 363 (1939).

"In the proceedings before the Commission in *Dairyland* and in *Salt River*, neither the Secretary of Agriculture, who intervened, nor the Rural Electrification Administration itself ever contended that REA-financed cooperatives were instrumentalities of the United States Government. On the contrary, the Rural Electrification Administration has taken the position that cooperative-owned electric systems are 'independent businesses' controlled by their 'owner-mangers.' We agree that such cooperatives are, as presently organized and financed, not government instrumentalities under Section 201(f) of the Federal Power Act." (Pages 6-8 of the slip opinion of the United States Court of Appeals for the District of Columbia entered July 2, 1968 in *City of Paris v. Federal Power Commission*, Case Number 21,375)

The decision of the court below is in direct conflict with the above reasoning and the holding in the *City of Paris* case. This conflict necessarily results in rural electric cooperatives in certain states being treated as government instrumentalities while those in other states would not be so treated if the courts in such states elected to follow the *City of Paris* decision. Moreover, since in many cases there is an election between

appealing to the "home" circuit court of appeals or to the Circuit Court of Appeals for the District of Columbia, it will be possible for the same rural electric cooperative to be treated differently in two separate cases.

The conflict between the Fifth Circuit and the District of Columbia Circuit with respect to whether rural electric cooperatives are instrumentalities of the United States *vel non* is an important question of federal law which has not been, but should be, settled by this Court. Should the decision of the Fifth Circuit stand, questions would arise as to whether such cooperatives, as instrumentalities, would be subject to state taxation, would be subject to suit by anyone for any purpose without consent of Congress, or would be subject to the provisions of the National Labor Relations Act or the Fair Labor Standards Act concerning their employees. Other important questions remain unanswered so long as their status is unsettled.

Reason IV: The decision below involves a federal question decided in conflict with *Hardin v. Kentucky Utilities Company*, _____ U.S. _____, 19 L. Ed. 2d 787 (Case No. 40 decided January 16, 1968).

The decision below held that Alabama Power Company has no standing to have a hearing on the merits to determine if the Administrator of REA went outside the range of permissible choices contemplated by the Rural Electrification Act of 1936 when he participated in and became a party to the 35 year monopolistic contracts which violate the antitrust laws (laws

intended by Congress to protect petitioner's competitive interests). Such decision is in *direct conflict* with the decision of this Court in *Hardin v. Kentucky Utilities Company*, _____ U.S. _____, 19 L. Ed. 2d 787 (Case No. 40 decided January 16, 1968).

In *Hardin* the plaintiff complained that Tennessee Valley Authority violated express provisions of a statute; in this case petitioner complains that the Administrator of REA violated the express prohibitions of Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act. In *Hardin* the plaintiff's standing to sue was based upon Congress' intent to protect a competitive interest; in this case petitioner's standing to sue is based upon particular statutory provisions of the antitrust laws reflecting Congress' intent to protect a competitive interest, which standing is fortified and expressly conferred by Section 16 of the Clayton Act, 15 U.S.C. § 26 (Appendix C, page 61a). In *Hardin* a full hearing on the merits was held to determine if TVA's actions were "outside the range of permissible choices contemplated by the statute;" in this case petitioner has been denied a hearing on the merits to determine if the REA Administrator went "outside the range of permissible choices contemplated by the statute" when he required and became a party to 35 year market foreclosure contracts proscribed by the antitrust laws.[10] In *Hardin* this Court expressly confirmed standing to sue as had the district court and the Court of Appeals for the Sixth Circuit; in this case the majority opinion

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[10] In *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 689 (1949), the court stated: "There may be, of course, suits for specific relief against officers of the sovereign which are not suits against the sovereign. . . . where the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions. . . ."

below has not only denied standing to sue the REA Administrator, but also denied standing to sue a private Alabama corporation, Alabama Electric Cooperative, Inc. Yet the same cases cited by the majority opinion below against standing [*Alabama Power Company v. Ickes*, 302 U.S. 464 (1938); *Tennessee Electric Power Company v. T.V.A.*, 306 U.S. 118 (1939); *Kansas City Power & Light Co. v. McKay*, 225 F.2d 924 (D.C. Cir. 1955); and *REA v. Central Louisiana Electric Co., Inc.*, 354 F.2d 859 (5th Cir. 1965)] were argued to this Court in *Hardin* and rejected by this Court as not applicable where the plaintiff was suing to enforce statutory provisions (in this case, the antitrust laws) enacted by Congress to protect a competitive interest.

The decision below indicates that it is the view of the majority that no suit could be maintained against the Administrator of REA for his violations of the antitrust laws in the absence of a specific provision in the Rural Electrification Act authorizing judicial review of his actions. *Hardin* teaches otherwise. There the same contention was made, i.e., that Kentucky Utilities could not review the actions of TVA because there was no specific provision in the TVA Act authorizing such review. This court totally rejected this contention and stated:

> "... it has been the rule at least since the Chicago Junction Case, 264 U S 258, 68 L ed 667, 44 S Ct 317 (1924), that when the particular statutory provision invoked does reflect a legislative purpose to protect a competitive interest, the injured competitor has standing to require compliance with that provision. See Alton R. Co. v United States, 315 US 15, 19, 86 L ed 586, 593, 62 S Ct 432 (1942); Chicago v Atchison,

T.&S.F.R. Co., 357 US 77, 83, 2 L ed 2d 1174, 1180, 78 S Ct 1063 (1958).

* * *

"... Since respondent is thus in the class which § 15d is designed to protect, it has standing under familiar judicial principles to bring this suit, see Stark v. Wickard, 321 US 288, 309, 88 L ed 733, 747, 64 S Ct 559 (1944); cf. United States v ICC, 337 US 426, 433-434, 93 L ed 1451, 1458, 1459, 69 S Ct 1410 (1949), and *no explicit statutory provision is necessary to confer standing.*" (Emphasis supplied) (19 L. Ed. 2d 787, 792-793)

In this case, as in *Hardin,* there is a statute (the antitrust laws) designed to protect a competitive interest (i.e., to be free from unlawful monopolistic practices); petitioner is in the class which the antitrust laws were designed to protect; and "no explicit statutory provision is necessary to confer standing."

It seems beyond rational question that, if the plaintiff in *Hardin* had standing to sue TVA for allegedly violating a provision in the TVA Act enacted for plaintiff's benefit, petitioner Alabama Power Company has any less standing to sue the REA Administrator for allegedly violating the antitrust laws by the 35 year market foreclosure contracts. There can be no doubt that the antitrust laws were passed for petitioner's protection. Any possible doubt in this regard is removed by Section 16 of the Clayton Act, 15 U.S.C. § 26 (Appendix C, page 61a), which clearly confers such standing. As stated by Circuit Judge Godbold in his dissenting opinion below:

> "Insofar as the antitrust laws are concerned, this court need not pause on the inquiry—over which the parties do mighty battle in their briefs—of attack on the loan vs. attack on the requirement contracts as an incident of the loan. The Power Company has standing to attack the contracts standing alone, whether or not the Administrator is a formal party thereto, and to attack the broader range of activities of which the contracts are a part and in which the parties defendant are charged as participants." (394 F.2d 672, 692 and Appendix A, page 43a)

The respondents, in their brief in opposition to this petition, will doubtless continue to argue the applicability of *Alabama Power Company v. Ickes*, 302 U.S. 464 (1938); *Tennessee Electric Power Company v. T.V.A.*, 306 U.S. 118 (1939); and *Kansas City Power & Light Co. v. McKay*, 225 F.2d 924 (D.C. Cir. 1955), *cert. denied*, 350 U.S. 884 (1955). But such cases are no more applicable here than they were in *Hardin*, wherein their applicability was also argued and the Court of Appeals for the Sixth Circuit stated:

> "... Their *(Ickes, T.V.A.* and *Kansas City)* surface analogy is immediately dissipated by the fact that in none of them was the plaintiff's suit planted on a federal statute enacted specifically for the protection of the involved plaintiff...." (375 F.2d 403, 416)

Here, petitioner's suit is predicated on the antitrust laws enacted specifically for petitioner's protection. These laws contain provisions expressly conferring standing to sue. Material

features which distinguish such three cases from this case may be summarized as follows:

1. This case is expressly brought *under* the procedural sections of the antitrust laws to enjoin violations thereof; *Ickes, T.V.A.* and *Kansas City* were not. Standing in *Ickes* and *T.V.A.* was asserted under general equity principles and standing in *Kansas City* was asserted only under the Administrative Procedure Act.

2. This case is based upon federal statutes (the antitrust laws) specifically enacted for the protection of petitioner; *Ickes, T.V.A.* and *Kansas City* were not.

3. This case involves unlawful competition in violation of the antitrust laws; *Ickes, T.V.A.* and *Kansas City* all involved competition found by the trial courts to be lawful. In *Ickes* and *T.V.A.* the court specifically found no conspiracy.

4. There has been no hearing on the merits in this case to determine the serious factual issues presented by the complaint. In *Ickes, T.V.A.* and *Kansas City* there was a full hearing on the merits and factual issues resolved by the trial court.

5. In this case, a private Alabama corporation is a defendant. In *Ickes, T.V.A.* and *Kansas City* all the defendants were governmental defendants.

Principles stated by this Court in *T.V.A.* and *Ickes* actually confirm petitioner's standing to sue. *T.V.A.* holds that standing to sue exists if agency action has invaded a "legal right"—"one founded on a statute which confers a privilege." *Tennessee Electric Power Co. v. T.V.A.*, 306 U.S. 118, 137 (1939). *Ickes* stands for the same principle. *Alabama Power Company v. Ickes*, 302 U.S. 464, 479 (1938). The antitrust laws do confer upon petitioner a privilege, the privilege to be free from unlawful competition. *Ickes* also stated that "If conspiracy or fraud or malice or coercion were involved a different case would be presented" *(supra,* at page 479). And the complaint in this case does allege both conspiracy *and* coercion (R 12).

Reason V: The decision below has improperly applied and extended *Barr v. Matteo*, 360 U.S. 564 (1958), and the writ should be granted so that this Court's holding in *Barr* can be clarified.

The case of *Barr v. Matteo*, 360 U.S. 564 (1958), relied upon by the court below is not applicable to this case. *Barr* and the principal case upon which it was based, *Spalding v. Vilas*, 161 U.S. 483 (1896), both involved a *personal* damage suit for libel brought against a government official and were concerned with privileged statements made within the limits of the official's authority. In *Barr* this Court clearly stated that the reason for privileges against personal libel suits was to prevent the official, in defending such a personal attack, from consuming "time and energies which would otherwise be devoted to governmental service" (p. 571). This case is not the same as a personal damage suit against an official. The "time and energies" consumed by the governmental defendants in accounting for their action would be a proper part of their governmental service. It is certainly encumbent on a government official to cooperate in a

judicial exploration of the impact of the antitrust laws on the activities of his agency, especially when the activities in question are expected to be pursued in the future. Moreover, in *Barr* there was a trial and the outer perimeter boundaries were determined. There has been no hearing in this case. The court below has thus improperly extended this Court's holding in Barr.

It is significant that this Court in *Barr* was split five (Mr. Justices Harlan, Frankfurter, Clark, Whittaker and Black) to four (Chief Justice Warren and Mr. Justices Douglas, Brennan and Stewart) and one of the majority, Mr. Justice Black, wrote a special concurring opinion based solely on the fact that Congress had not forbidden the giving of press releases by the government official. In this case Congress has expressly forbidden restraints upon trade. Likewise, it has forbidden REA from making a loan to serve only those already receiving electric power from central station service.

Reason VI: **The decision below is in conflict with other decisions of the courts of appeal.**

The decision below is in conflict with *Harman v. Valley National Bank of Arizona*, 339 F.2d 566 (9th Cir. 1964) and *Bankers Life and Casualty Co. v. Larson*, 257 F.2d 377 (5th Cir. 1958), *cert. denied*, 350 U.S. 884. These cases hold that the antitrust laws apply to actions of a governmental employee where the employee, without *specific* sovereign approval, conspires with private individuals to violate the antitrust laws and where such employee becomes a participant in a private agreement between others for restraint of trade.

Eastern Railroad Presidents Conference v. Noerr, 365 U.S. 127, 136 (1961), dictum[11] from which is cited by the court below (394 F.2d 672, 677 and Appendix A, pages 10a-11a) did not deal with an unlawful combination of the character sought to be outlawed by the Sherman Act. There the action complained of was a combination of railroads *(there was no governmental defendant)* seeking to induce the passage of specific legislation. This Court properly held in *Noerr* that such type of activity, i.e., a combination as a part of an attempt to bring about legislative action, was not such a combination as was prohibited by the Sherman Act. In so holding and in delineating the type of action which the Sherman Act was intended to reach, this Court emphasized that the Sherman Act was intended to reach only combinations which have as their objective interfering with the freedom of trade, establishing price-fixing agreements, entering into exclusive marketing agreements, or other similar business arrangements, the effect of which would be to restrain trade. Thus, this Court stated in *Noerr*:

> "We think it equally clear that the Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly . . . . " (365 U.S. 127, 136)

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[11] The majority opinion below quotes from *Noerr* for the proposition that a restraint upon trade which is the result of valid governmental action, as opposed to private action, does not violate the Sherman Act. While such a statement is contained in *Noerr* it is nevertheless dictum to such case for the reason that (a) no governmental action was involved therein but only an effort by private individuals to influence the passage of a legislative (governmental) act; (b) no governmental defendant was involved therein, and (c) no restraint upon trade of the character intended to be proscribed by the Sherman Act was present therein.

In the case now before this Court, petitioner charges the very type combination and conspiracy pointed out in *Noerr* to be the type proscribed by the Sherman Act, i.e., a conspiracy to establish an exclusive market and to prevent the distributing cooperatives and petitioner from dealing with one another. *Noerr* specifically noted that there were "no specific findings that the railroads attempted directly to persuade anyone not to deal with the truckers" (365 U.S. 127, 142). In the case now before this Court, there are specific allegations that the defendants directly attempted to persuade, and did persuade, the distributing rural electric cooperatives not to deal with petitioner for the balance of the twentieth century.

Parker v. Brown, 317 U.S. 341 (1943), likewise relied upon by the court below cannot be used to justify the violation of the antitrust laws which has been alleged in the complaint in this case. The activities complained of in *Parker* were at the *specific* direction of the sovereign and the *specific* end sought by the sovereign was an end which otherwise would be proscribed by the antitrust laws. Equally significant is the fact that in *Parker* there was no charge that the state or one of its employees had entered into a conspiracy to restrain trade.

United States v. Rock Royal Cooperative, Inc., 307 U.S. 533 (1939), is equally inapplicable. No governmental agency or governmental official was included as a defendant. More significant, however, *Rock Royal* dealt with acts of private individuals or corporations in complying with an order of the Secretary of Agriculture entered pursuant to the *express* provisions of an act of Congress, the Agricultural Marketing Agreement Act of 1937, 50 Stat. 246. There can be no question but that the Secretary of Agriculture there had the authority

from Congress to enter the order with which the defendants were complying. A fair and correct analysis of *Rock Royal* is simply to the effect that the same Congress which adopted the Sherman Act can likewise adopt a later act which authorizes actions which otherwise would violate the Sherman Act. The establishment of that principle, however, does not establish that Congress has in the Rural Electrification Act of 1936 authorized the conspiracy of which complaint is herein made.

CONCLUSION

The decision below is manifestly incorrect and deprives petitioner of the opportunity to protect its legal rights. It creates a dangerous principle which is being applied on a broad scale and is susceptible of even broader and more dangerous application. It is contrary to settled law and will result in confusion. Therefore, for the reasons set forth above, petitioner respectfully prays that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 8, 1968

APPENDIX A
OPINIONS AND JUDGMENT OF COURT OF APPEALS

IN THE
United States Court of Appeals
FOR THE FIFTH CIRCUIT

No. 23016

ALABAMA POWER COMPANY,
Appellant,

versus

ALABAMA ELECTRIC COOPERATIVE, INC., ET AL.,
Appellees.

Appeal from the United States District Court for the Middle District of Alabama

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(April 2, 1968.)

Before RIVES, GEWIN AND GODBOLD, Circuit Judges.

RIVES, Circuit Judge: Alabama Power Company (hereafter Power Company) filed its complaint against Rural Electrification Administration (REA), Alabama Electric Cooperative, Inc. (AEC), Norman M. Clapp, the Administrator of REA, the Department of Agriculture and the Secretary of Agriculture. The complaint prayed for a preliminary and permanent injunction restraining the consummation or use of a $20,350,000.00 loan from REA to AEC for the purpose of financing the construction and operation of a generating plant and high voltage electric transmission and distribution lines. It

prayed separately for a judgment avoiding certain 35-year all-requirements electric power contracts between AEC and fourteen electric distribution cooperatives as violative of the antitrust laws, and sought to recover from AEC treble damages, costs and attorneys' fees.

The defendants moved to dismiss and, alternatively, for summary judgment. Affidavits were filed in support of and in opposition to the plaintiff's motion for preliminary injunction and the defendants' motions for summary judgment. The district court, in an opinion reported in 249 F. Supp. at 855, denied plaintiff's motion for preliminary injunction and granted the several motions of the defendants to dismiss the action. The district court held that the Power Company had no standing to enjoin the consummation of the REA loan. The 35-year all-requirements electric power contracts the district court held were the result of valid governmental action and, hence, not violative of the antitrust laws. Since we are in agreement with the district court, what was said in its able opinion need not be repeated and our opinion can be brief.

Power Company argues that it has standing to seek judicial review of the REA loan either as made in violation of the "central station service" limitation contained in Section 4 of the REA Act,[1] or as being conditioned upon a violation of the antitrust laws.[2] As to the claim of standing under the REA Act, it has been repeatedly held that increased competition which may result to a private power company does not give it

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1 7 U.S.C.A. § 904.

2 Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act, 15 U.S.C.A. § § 1,2 and 14.

sufficient standing to enjoin the making of a loan by a federal agency.[3] The answer to the claim of standing under the antitrust laws was indicated in *Kansas City Power & Light Co. v. McKay, supra* note 3, and was clearly furnished in the Fifth Circuit case decided some months after the district court's decision in the instant case, *Rural Electrification Administration v. Central Louisiana Electric Co., supra* note 3. There, this Court said:

> "From the entire history of the Rural Electrification Act and its administration we are totally convinced that Congress has never enacted or intended that loans by this Agency should be reviewable in the courts. The Act itself makes no provision for judicial loan review. By the allegations of the Complaints we are informed of the thorough manner in which Congress has ridden herd on the REA. Congressional Committees caused the promulgation of the REA Bulletin 111-3, which appellees now say has been violated. Certainly, the demands of Congressional Committees do not have the force of law. Congress has seen fit not to enact these particular demands into law, evidently being most content to rely on the deadly sword constantly in its own hands, that is, the sole control of the purse out of

[3] Alabama Power Company v. Ickes, 1938, 302 U.S. 464; Duke Power Company v. Greenwood Co., 1938, 302 U.S. 485; Tennessee Electric Power Co. v. TVA, 1939, 306 U.S. 118; Kansas City Power & Light Co. v. McKay, D.C. Cir. 1955, 225 F.2d 924, *cert. den.*, 350 U.S. 884; Rural Electrification Administration v. Central Louisiana Electric Co., 5 Cir. 1966, 354 F.2d 859. See also Hardin v. Kentucky Utilities Co., U.S. Oct. Term 1967, Nos. 40, 50 and 51, decided Jan. 16, 1968, ms., 19 L.ed. 787.

which the loans are made. Regardless of how outrageous or unfair the making of this loan may seem, the remedy is not in the courts but in the Congress." 354 F.2d at 865.

The same thought had been earlier expressed by the D. C. Circuit in the *Kansas City Power & Light Co.* case, *supra.* See 225 F.2d at 930, 931. As later said by the Eighth Circuit in *Rural Electrification Administration v. Northern States Power Co.*, 1967, 373 F.2d 686, 700:

"Congress has steadfastly refused to provide judicial review under 7 U.S.C. §901 of the REA Act.[26] This silence could be premised on the concern that the private supplier could otherwise interfere with REA loans in each instance where the Administrator finds the public suppliers proposal unreasonable.

"[26]See, e.g., Schilling v. Rogers, 363 U.S. 666, at 674. 80 S.Ct. 1288, at 1294, where Justice Harlan said:

" 'The point is that in this Act [Trading with the Enemy Act] Congress was advertent to the role of courts, and an absence in any specific area of any kind of provision for judicial participation strongly indicates a legislative purpose that there be no such participation * * * [citing Work v. United

States, ex rel. Rives, 267 U.S. 175, 182, 45 S.Ct. 252].'

In 1962 and 1963 attempts were made to introduce bills into Congress amending the Rural Electrification Act to provide for public hearings and judicial review of orders approving loans. These bills were not reported out of committee. See Hearings on Food and Agriculture Act of 1962 before House Committee on Agriculture, 87th Cong., 1st Sess., pp. 680-681. See also H.R. 6852 and H.R. 7213, 88th Cong., 1st Sess.; Hearings before House Appropriations Committee on Department of Agriculture Appropriations for 1964, 88th Cong., 1st Sess., p.374."

In brief, review under the Administrative Procedure Act of 1946, 5 U.S.C.A. § 1009, is precluded by that statute's initial exception to the right of review: "Except as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion * * *." The REA Act, 7 U.S.C.A. § 904, commits to the discretion of the Administrator the making of loans for rural electrification, including the adequacy of the security for such loans. The statute not only fails to provide for judicial review, but when construed in the light of its purpose and of legislative history, the statute retains oversight of the Administrator's actions in the hands of Congress itself and precludes judicial review.

The same rationale would deny the plaintiff Power Company standing to enjoin the consummation of the loan or its claimed invalid provision for security directly under the antitrust laws. Further, it is settled that neither the Sherman Act nor the Clayton Act was intended to authorize restraint of governmental action.[4] A different question might be presented if the Administrator went beyond the outer perimeter of the authority vested in him by the statute,[5] or as expressed in *Hardin v. Kentucky Utilities Co.*, cited *supra* note 3, "* * * outside the range of permissible choices contemplated by the statute." The Administrator's affidavit discloses that that condition does not arise under the circumstances of this case.

> "My policy reasons for approving the aforesaid loan were: (1) it would result in significant savings in the cost of power to AEC and the Members as compared with the cost of power purchased by AEC and the Members from the plaintiff and Gulf Power Company; and (2) the loan was necessary to protect the effectiveness and security of AEC and the Members since the plaintiff had through its activities demonstrated its intent to deprive

[4] United Mine Workers v. Pennington, 1965, 381 U.S. 657, 671-672; Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 1961, 365 U.S. 127; Parker v. Brown, 1943, 317 U.S. 341; United States v. Rock Royal Co-op, 1939, 307 U.S. 533, 559-560; E. M. Wiggins Airways, Inc. v. Massachusetts Port Authority, 1 Cir. 1966, 362 F.2d 52; Stroud v. Benson, D.C. N.C. 1957, 155 F.Supp. 482; Miley v. John Hancock Mut. Life Ins. Co., D.C. Mass. 1957, 148 F. Supp. 299.

[5] See S & S Logging Co. v. Barker, 9 Cir. 1966, 366 F.2d 617; Norton v. McShane, 5 Cir. 1964, 332 F.2d 855, 859; compare Pierson v. Ray, 1967, 386 U.S. 547.

AEC and the Members of existing and potential consumers in their service areas, and since continuance of dependence by AEC and the Members upon plaintiff as a wholesale supplier would inevitably assist and facilitate such activities on the part of the plaintiff.

"As authorized by section 4 of the RE Act (7 U.S.C. 904), the loan to AEC is to be repaid over a period of thirty-five (35) years. It has been the practice for many years of REA Administrators, including the affiant, to require as a condition of making generating and transmission loans pursuant to section 4 to cooperatives such as AEC, that the borrower shall obtain 35 year contracts with its members (hereinafter called 'thirty-five year, all-requirements contracts') obligating them to purchase all of their electric requirements to the extent that the borrower shall have power and energy available. The purpose of this requirement is to assure that the borrower will have a market for the power generated and transmitted by the REA-financed facilities and thus be able to repay the loan. Such a requirement is established customarily, and was imposed on AEC in this case, in the exercise of the REA administrator's power and obligation under section 4 to obtain reasonably adequate security for the loan and to assure its repayment within the time agreed upon between REA and AEC. As further assurance, following long-established REA practice, I also

required the execution of the supplemental agreement included in Exhibit B attached to the plaintiff's complaint. As shown in paragraph 7 below, the facilities for which the loan in question was made will not be placed into operation before 1968 at the earliest. Based on load forecasts made before the loan was approved, AEC will have power and energy available for the total electric requirements of its members for a period of no more than 2 years thereafter. Based on the same forecasts, AEC's available power and energy in 1974 will represent no more than 83% of its members' electric requirements in that year, and such percentage will significantly decline each year thereafter. Under their contracts with AEC, the Members will be free to purchase from plaintiff and others their electric requirements in excess of the power and energy available from AEC.

"AEC is owned and controlled by its members and is merely the means by which they generate and transmit electric power for themselves rather than purchasing power and transmission service from another source. Instead of having one organization performing the generating, transmitting and distributing function, AEC engages in the first two operations on behalf of its members and the latter perform the distributing operation. Because of this separation of the operations required to serve consumers the 35-year, all requirements contracts between AEC

and the Members were necessary to meet the requirements of section 4 of the RE Act (7 U.S.C. 904)."

Thus in requiring AEC to obtain 35-year all-requirement contracts with its electric distribution cooperatives, the Administrator was doing nothing unusual, but was simply following customary and long-established REA practice, clearly not beyond the "outer perimeter" of his statutory authority[6] to determine the security for the loan. Anything less might well mean the acceptance of inadequate security. Under these circumstances, to require or permit the "outer perimeter" boundaries to be determined by another fact-finding body would defeat the reasons for the recognition of the absolute privilege. What was said by Mr. Justice Harlan in *Barr v. Matteo*, 1958, 360 U.S. 564, 571, is illuminating:

> "It has been thought important that officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect to acts done in the course of those duties—suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government."[7]

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[6] 7 U.S.C.A. § 904.

[7] See also Mr. Justice Harlan's long quotation from Judge Learned Hand's opinion in Gregoire v. Biddle, 2 Cir. 1949, 177 F.2d 579, 581, appearing at 360 U.S. 571-572.

Finally, a unique question presented by the Power Company must be answered. This is the first of the attacks by private power companies on federal loans to competitors in which there has been a *separate* attack on the borrower and those alleged to be in conspiracy with it for claimed violation of the antitrust laws. It is argued that there is nothing in the Act or in its legislative history which authorizes the Administration to grant immunity to the borrower, AEC,[8] and that at the very least the plaintiff has a right to pursue its antitrust suit against AEC. That position, we think is based upon too narrow a conception of the program authorized by Congress. The making of loans by the Administrator necessarily includes the existence and ability of borrowers to whom such loans can be made. If the security which the Administrator requires can be undercut and the borrower mulcted in treble damages for complying with the condition imposed by the Administrator for making the loan, then the functioning of the Act will be crippled, if not defeated. To avoid frustrating the intent of Congress, it must follow that in cases where the Administrator is immune from suit under the antitrust laws, the borrower is likewise immune.[9]

> The Supreme Court has repeatedly held that, "* * *where a restraint upon trade or monopolization is the result of valid governmental

[8] Or, we might add, to its member distributing cooperatives, though they have not been joined as parties defendant.

[9] In so holding, we fully appreciate that immunity from the antitrust laws is not to be lightly implied. California v. Federal Power Commission, 1962, 369 U.S. 482, 485; United States v. Philadelphia National Bank, 1963, 374 U.S. 321, 350; Carnation Company v. Pacific Westbound Conference, 1966, 383 U.S. 213, 218; United States v. First City National Bank, 1967, 386 U.S. 361, 368.

action, as opposed to private action, no violation of the Act can be made out.[15]

"[15] United States v. Rock Royal Co-op, 307 U.S. 533; Parker v. Brown, 317 U.S. 341."

Eastern R. Conf. v. Noerr Motors, 1961, 365 U.S. 127, 136.

The Power Company would treat REA simply as a rival public utility. We agree with the recent decision of the Federal Power Commission in *Dairyland Power Cooperative*, 37 F.P.C. 12, 35 L.W. 2385, that rural electric cooperatives are something more than public utilities; they are instrumentalities of the United States. "They were chosen by Congress for the purpose of bringing abundant, low cost electric energy to rural America." See also, *Salt River Project Agricultural & Power District v. FPC*, D.C. Cir., Feb. 15, 1968, 36 L.W. 2524.

The judgment is therefore

AFFIRMED.

GODBOLD, Circuit Judge, dissenting:

I must disagree with my associates.

This case presents in bold and clear form issues not heretofore judicially determined of the interplay between, on the one hand, the antitrust laws and the national policy which they represent and, on the other hand, the Rural Electrification Act[1] and national policies of aid to rural citizens without electric service. In addition there are vital factual issues which have been neither determined nor reached, since the decision below was a dismissal for lack of standing to sue.

Three issues must be discussed. Discussion of each overlaps the others, and the relationship between them has been hazy at times in the previous case history:

(1) Standing to sue under the antitrust laws of the United States. In my opinion the Power Company has standing.

(2) Implied governmental immunity from the antitrust laws of the REA Administrator, of private citizens who deal with him, and of private citizens who deal between themselves as incident to or in consequence of dealings with the Administrator. In my view the Administrator has no such implied immunity as a governmental officer whether acting within or without the "outer periphery of his authority." If he possesses such implied immunity he cannot pass it on to private citizens to immunize them in their dealings with him or to private citizens to immunize them in their dealings with each other.

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1 7 U.S.C.A. § 901 et seq.

(3) If the Administrator does enjoy an implied immunity the existence of which depends upon whether he was acting within the outer limits of his authority, there is a material issue of fact, not yet adjudicated, as to whether he was within such limits.

I. The 35-year exclusive dealing contracts

The provisions of the contracts which the Administrator, as a condition of approval of the loan to AEC, required be executed by AEC and the distributor cooperatives, are central to the case. The majority describe the contracts, without amplification, as "certain 35-year all-requirement-electric contracts between AEC and fourteen electric distribution cooperatives."[2]

The contracts require the distributing cooperative (Distributor) to purchase all of its electric power needs from AEC (Supplier):

> Supplier shall sell and deliver to Distributor and Distributor shall purchase and receive from Supplier all electric power and energy which Distributor shall require to the extent that Supplier shall have such power and energy available, provided, however, that Distributor shall have the right to continue to purchase electric power and energy from a source other than Supplier for all or a separable part of its system

[2] The distribution cooperatives are not parties to the suit. The Administrator claims he is not a party to the contracts. But see footnote 3, infra.

until Supplier shall be in position to supply Distributor's requirements for its system or such part thereof.

The contracts require the distributing cooperative, at such time as it may legally do so, to terminate its contracts with other power suppliers upon request of AEC made with the approval, or at the direction, of the Administrator. If the Distributor fails to terminate an existent contract either the Supplier or the Administrator may bring suit to enforce the termination provisions.

> Distributor shall terminate, if the Supplier with the approval of the Administrator of the Rural Electrification Administration shall so request, any existing contract or contracts with a source other than Supplier at such time as it may legally do so, provided Supplier shall have sufficient electric power and energy available for Distributor.
>
> * * * *
>
> The Supplier, the Distributor and the Administrator agree that if the Distributor, upon being requested to do so by the Supplier with the approval or at the direction of the Administrator, shall fail to terminate any contract with a power supplier other than the Supplier, as provided by Section 1 of the Power Contract, the Supplier or the Administrator, if he shall so select, shall have the right to enforce the obligations of the

> Distributor under the provisions of said Section 1 of the Contract by instituting all necessary actions at law or suits in equity, including, without limitation, suits for specific performance.[3]

The Distributor purchases its power requirement under a rate schedule, which must be reviewed at least annually by it and AEC, and revisions may be agreed upon but are ineffective unless approved by the Administrator.

Contracts are required by the Administrator to be obtained from 13 distribution cooperatives located in Alabama, which the Power Company alleges endeavor to serve approximately 50% of the geographical area of the state, and three located in Florida. The Power Company alleges the 35-year contracts will foreclose it from supplying nine of these cooperatives, six of whom presently receive all their power, and three that receive part of their power, from the Power Company, and as a consequence it will be foreclosed from serving at least one-third of the rural areas of Alabama. The extent of the private utility's loss of market is a disputed issue of fact, but even under the

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3 This paragraph is part of a "Supplemental Agreement," to which the Administrator is to be a signatory, to the 35-year contracts. It creates a question of fact and law of whether the Administrator himself becomes a party to the transactions between AEC and the distributors.

assertions of the appellees the share of the relevant market involved is, in my opinion, as a matter of law substantial.[4]

Totally without relevance is the contention of AEC that REA has made it previous loans and in connection with each has required similar 35-year contracts, but the Power Company has not before claimed them to be violations of the antitrust laws. There is no right by prescription to violate the antitrust laws. This theory that governmental action can bootstrap itself to a state of validity is expressly adopted by the majority, who conclude that in making the contracts the Administrator was not beyond the outer perimeter of his authority because he was "doing nothing unusual, but was simply following customary and long-established REA practice."

Neither the district court nor the majority in this court reach the issue of whether the contracts are proscribed by the antitrust laws. They simply decline to scrutinize them. The complaint—and at this stage we take its allegations as true—sets

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[4] AEC states the loss will be of two all-requirements customers and three partial-requirements customers. In its brief AEC concedes the Power Company will lose, at least temporarily, approximately 16% of its total wholesale sales to cooperatives and municipal systems.

Several arguments of appellees may have relevance to a factual determination of impact on the relevant market, if that not be established as a matter of law, or of the extent of restraints on commerce, but have no relevance at this juncture—i.e., that AEC serves a smaller area and has smaller capital investment and operating revenue than Alabama Power; that based on AEC projections it will not generate enough power to serve all needs of the distributor cooperatives, and the private companies will have a chance to meet the need for the excess.

Certainly it cuts no figure at this stage, and maybe never, that REA argues the termination provisions of the contracts will not be exercised until expiration of existing wholesale contracts between distributors and Alabama Power, and if existing contracts are breached the power company will have an adequate remedy in damages.

out a classic case of an exclusive supply contract which violates Section 3 of the Clayton Act because it forecloses in the relevant market a substantial share of the line of commerce affected. *Pennsylvania Water & Power Co. v. Consolidated Gas, Elec. Light & Power Co.*, 184 F.2d 552 (4th Cir.), *cert. denied*, 340 U.S. 906, 71 S.Ct. 282, 95 L.Ed. 655 (1950); *Consolidated Gas, Elec. Light & Power Co. v. Pennsylvania Water & Power Co.*, 194 F.2d 89 (4th Cir.), *cert. denied*, 343 U.S. 963, 72 S.Ct. 1057, 96 L.Ed. 1361 (1952). See also *Tampa Elec. Co. v. National Coal Co.*, 365 U.S. 320, 81 S.Ct. 623, 5 L.Ed. 2d 580 (1961); *Standard Oil Co. of California v. United States*, 337 U.S. 293, 69 S.Ct. 1051, 93 L.Ed. 1371 (1949); *International Salt Co. v. United States*, 332 U.S. 392, 68 S.Ct. 12, 92 L.Ed. 20 (1947). While I view the violation as otherwise unquestionable, if there be any question the 35-year duration lays it to rest. It is an exclusive dealing arrangement that can foreclose the Power Company for the rest of the twentieth century. *United States v. American Can Co.*, 87 F.Supp. 18 (N.D. Cal. 1949).[5] Nor do I have any doubt that the contracts, and the effects alleged, constitute restraints violating the Sherman Act. *Consolidated Gas, supra.*[6]

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[5] See also *United States v. Pullman Co.*, 50 F.Supp. 123, 129 (E.D. Pa. 1943):

> "As a competition killer the long term contract is an effective weapon. One could hardly have a more favored service contract than an agreement for exclusive dealing . . . and a quarter century of time to elapse before one need to be concerned with new terms. Even a patentee is not so secure against the passage of time."

[6] The contract in *Consolidated* included price fixing, a per se violation of the Sherman Act. Also it foreclosed competitors from a substantial market and divided territory between competitors. 184 F.2d at 558, 559.

Standing alone the contracts violate the antitrust laws. As part of a wider course of dealings they violate the antitrust laws and so characterize that broader spectrum as to make it a violation. The violation by the contracts is so clear that I do not pursue the allegations that the Administrator coerced the distribution cooperatives into signing them, a factual issue.

II. Immunity

The majority conclude the Administrator enjoys a governmental immunity from the Sherman and Clayton Acts for acts done within the outer periphery of his authority. Examination of this premise is inextricably entwined with consideration of the two implications drawn therefrom, that the Administrator's immunity extends to private citizens (the AEC) who deal with him and to private citizens who deal between themselves (the AEC and the distribution cooperatives) as an incident to or in consequence of their dealings with the Administrator.

None of these immunities can be found in the REA Act.

The majority opinion tips its hat to the principle that "[i]mmunity from the antitrust laws is not lightly implied." *California v. Federal Power Comm'n.*, 369 U.S. 482, 485, 82 S.Ct. 901, 8 L.Ed. 2d 54, 57 (1962). In fact, "[t]his canon of construction . . . reflects the felt indispensable role of antitrust policy in the maintenance of a free economy." *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 348, 83 S.Ct. 1715, 10 L.Ed. 2d 915, 936 (1963).

Congress can, and in numerous instances by express legislation has, subordinated the national policies reflected in the antitrust laws so as to authorize government officials to perform acts or pursue policies without regard to the antitrust laws. The exemptions or immunities thus conferred are in some instances to conduct between the official and the citizen, in others to dealings between private citizens which the official is authorized to review and if approved the citizen has immunity. The courts carefully have limited these expressly conferred immunities to the scope defined in each instance by Congress so as to avoid pro tanto repeal of the antitrust laws.

Under the Agricultural Marketing Agreement Act the Secretary of Agriculture may become a party to marketing agreements with private citizens for the handling of agricultural commodities which are exempt from the antitrust laws. 7 U.S.C.A. § 608b. In *United States v. Borden Co.*, 308 U.S. 188, 60 S.Ct. 182, 84 L.Ed. 181 (1939), the Supreme Court declined to broaden this specific exemption into a general exemption from § 1 of the Sherman Act of the marketing of agricultural commodities so as to immunize marketing agreements between private parties.[7] "If Congress had desired to grant any further immunity Congress doubtless would have said so." 308 U.S. at 201, 84 L.Ed. at 192. In the case before us the majority find an

[7] In like manner the Secretary of Agriculture may make marketing agreements with manufacturers and handlers of anti-hog-cholera serum and hog-cholera virus, 7 U.S.C.A. § 851 et seq., and the agreements are specifically exempted from antitrust laws, 7 U.S.C.A. § 852. The exemption extends no further than to the agreement itself. *American Co-op. Serum Ass'n v. Anchor Serum Co.*, 153 F.2d 907 (7th Cir.), *cert. denied*, 329 U.S. 721, 67 S.Ct. 57, 91 L.Ed. 625 (1946).

implied governmental exemption and the blanket thereof is then stretched to immunise exclusive dealing contracts between private parties, AEC and the distribution cooperatives.

"[T]he typical method adopted by Congress when it has lifted the ban of the Sherman Act is the scrutiny and approval of designated public representatives," (giving examples of the code machinery and presidential approval under the National Industrial Recovery Act, the ICC in transportation, the SEC over associations of brokers and dealers, the Bituminous Coal Commission over price fixing in the coal industry). *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 228 n. 60, 60 S.Ct. 811, 84 L.Ed. 1129, 1170 n. 60 (1940). The REA Act does not lift the ban. Nor does it confer upon the Administrator authority to create or approve, or to state applicable standards to govern the creation or approval, of situations or relations in derogation of the antitrust laws.

Compare the transportation industry. The original authority of the Interstate Commerce Commission[8] exemplified an implicit public policy that competition in the transportation field was desirable, a policy subsequently expressed for a broader field in the Sherman Act of 1890.[9] Subsequently, and repeatedly, Congress has amended the Interstate Commerce Act to grant authority to the ICC, in the context of a pervasive regulatory scheme, to approve and permit consolidations, mergers, controls, combinations, and agreements to fix rates, all outside the usual operation of the antitrust laws.[10] The history

[8] Interstate Commerce Act of 1887, 49 U.S.C.A. §1 et seq.
[9] 15 U.S.C.A. §1-7.
[10] See the discussion of the history in *United States v. Marshall Transport Co.*, 322 U.S. 31, 64 S.Ct. 899, 88 L.Ed. 1110 (1944).

reveals carefully-held Congressional reins over the interplay of antitrust policy and governmental action in derogation thereof. The Congressional action to create exemptions has not made the antitrust laws wholly inapplicable to the transportation industry; Congress has not authorized the ICC to ignore antitrust policies, for the Commission is under a duty, as an administrative matter, to consider effect on competitors and on the general competitive situation in the light of national transportation policy. *McLean Trucking Co. v. United States*, 321 U.S. 67, 84 nn. 20 & 21, 64 S.Ct. 370, 88 L.Ed. 544, 555 nn. 20 & 21 (1944).

With respect to many regulated industries the courts have rejected the theory that governmental grant—federal or state—of monopolistic privileges accompanied by regulation, sometimes all-pervasive, by government bodies carries an implied exemption from the antitrust laws or deprives the courts of jurisdiction to enforce them. See *Georgia v. Pennsylvania R.R.*, 324 U.S. 439, 65 S.Ct. 716, 89 L.Ed. 1051 (1945), sustaining the right of an injured party, the State of Georgia, to enjoin a conspiracy of railroads to fix rates in violation of the antitrust laws, although the rates had been approved by the ICC:

> But it is elementary that repeals by implication are not favored. Only a clear repugnancy between the old law and the new results in the former giving way and then only pro tanto to the extent of the repugnancy.

* * *

> It is sufficient here to note that we find no warrant in the Interstate Commerce Act and the Sherman Act for saying that the authority to fix joint through rates clothes with legality a conspiracy to discriminate against a State or a region, to use coercion in the fixing of rates, or to put in the hands of a combination of carriers a veto power over rates proposed by a single carrier. The type of regulation which Congress chose did not eliminate the emphasis on competition and individual freedom of action in rate making.

324 U.S. at 456-57, 458-59, 65 S.Ct. at 726, 89 L.Ed. at 1062, 1063. See also, as to railroads, *United States v. Terminal R.R. Ass'n*, 224 U.S. 383, 32 S.Ct. 507, 56 L.Ed. 810 (1912); the shipping industry, *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213, 86 S.Ct. 781, 15 L.Ed. 2d 709 (1966); banking, *United States v. Philadelphia Nat'l Bank, supra;* insurance, *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 64 S.Ct. 1162, 88 L.Ed. 1440 (1944); telephone, *United States Tel. Co. v. Central Union Tel. Co.*, 202 Fed. 66 (6th Cir. 1913); gas and electric energy, *In re American Fuel & Power Co.*, 122 F.2d 223 (6th Cir. 1941); *Pennsylvania Water & Power Co. v. Consolidated Gas, Elec. Light & Power Co., supra;* radio and television, *United States v. Radio Corp. of America*, 358 U.S. 334, 79 S.Ct. 457, 3 L.Ed. 2d 354 (1958); natural gas, *California v. Federal Power Com.*, 369 U.S. 482, 82 S.Ct. 901, 8 L.Ed. 2d 54 (1962); export trade associations, *United States Alkali Exports Ass'n v. United States*, 325 U.S. 196, 65 S.Ct. 1120, 89 L.Ed. 1554 (1945).

The Capper-Volstead Act[11] authorized agricultural producers to unite in preparing for market, and marketing, their products, and to make contracts necessary for that collaboration. The antitrust exemption thereby granted is much broader than the general provision of § 6 of the Clayton Act which excepts agricultural and horticultural cooperatives from the Sherman Act. But *Borden* held that the Capper-Volstead Act does not cover the entire field of the Sherman Act and does not authorize a combination or conspiracy with persons other than producers. See also, *Maryland & Virginia Milk Producers Ass'n v. United States*, 362 U.S. 458, 80 S.Ct. 847, 4 L.Ed. 2d 880 (1960).

Case-Swayne Co. v. Sunkist Growers, Inc., 36 U.S.L. Week 407 (U.S. Dec. 18, 1967), holds that the antitrust exemption granted by Congress to producer cooperatives under Capper-Volstead does not extend to give antitrust immunity to an association which has nonproducer interests in its participating membership, even though the participation of the nonproducers is relatively small.

The Fishermen's Collective Marketing Act[12] authorizes fishermen to market collectively, and the Secretary of the Interior has power to issue cease and desist orders if such organizations restrain trade to the extent of unduly enhancing prices. Neither Congressional authorization of the cooperative marketing association nor the power of the Secretary exempts fishermen and their association or union from the antitrust laws. *Hinton v. Columbia River Packers Ass'n*, 131 F.2d 88 (9th Cir. 1942).

There are various specific exemptions from antitrust laws in the labor field. Section 20 of the Clayton Act[13] withdrew from

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11 7 U.S.C.A. § 291-92.
12 15 U.S.C.A. § 521-22.
13 29 U.S.C.A. § 52.

the general prohibitions of the Sherman Act specifically enumerated practices of labor unions by prohibiting injunctions. Norris-LaGuardia[14] further narrowed the jurisdiction of federal equity power in labor disputes. Thereafter in determining if trade union conduct is a violation of Sherman one must read and harmonize Sherman, § 20 of Clayton, and Norris-LaGuardia. *United States v. Hutcheson*, 312 U.S. 219, 61 S.Ct. 463, 85 L.Ed. 788 (1941); *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 60 S.Ct. 982, 84 L.Ed. 1311 (1940). But Congress in granting immunity to labor organizations did not give immunity to combinations of labor with non-labor groups. *Allen Bradley Co. v. Local No. 3, IBEW*, 325 U.S. 797, 65 S.Ct. 1533, 89 L.Ed. 1939 (1945). The Supreme Court, in *Allen Bradley*, found nothing in the Congressional history to indicate that it was ever suggested, considered or legislatively determined that unions, while free to engage themselves in conduct which restrains trade, were to be granted immunity for aiding and abetting manufacturers and traders in violating the Sherman Act, the availability of such an exemption being solely for Congress.[15]

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14 29 U.S.C.A. § 101 et seq.

15 "It must be remembered that the exemptions granted the unions were special exceptions to a general legislative plan. The primary objective of all the Anti-trust legislation has been to preserve business competition and to proscribe business monopoly. It would be a surprising thing if Congress, in order to prevent a misapplication of that legislation to labor unions, had bestowed upon such unions complete and unreviewable authority to aid business groups to frustrate its primary objective. For if business groups, by combining with labor unions, can fix prices and divide up markets, it was little more than a futile gesture for Congress to prohibit price fixing by business groups themselves. Seldom, if ever, has it been claimed before, that by permitting labor unions to carry on their own activities, Congress intended completely to abdicate its constitutional power to regulate interstate commerce and to empower interested business groups to shift our society from a competitive to a monopolistic economy."

. . . .

"There is, however, one line which we can draw with assurance that we follow the congressional purpose. We know that Congress feared the concentrated power of business organizations to dominate markets and prices. It intended to outlaw business monopolies. A business monopoly is no less such because a union participates, and such participation is a violation of the Act." 325 U.S. at 809-10, 811, 89 L.Ed. at 1948-49.

The distribution cooperatives have no special status under the antitrust laws by reason of their being cooperatives. "It is significant that when Congress has desired to permit cooperatives to interfere with the competitive system of business, it has done so expressly by legislation." *Associated Press v. United States,* 326 U.S. 1, 14, 65 S.Ct. 1416, 89 L.Ed. 2013 (1945).

The judicially-created immunities of this case are rested on § 4 of the REA Act, 7 U.S.C.A. § 904. The Administrator squarely puts his requirement of the 35-year contracts on his power and obligation under § 4 to obtain reasonable security for the loan, that "loans shall be on such terms and conditions relating to the expenditure of the moneys loaned and the security therefor as the Administrator shall determine." It boggles the imagination to suggest that the myriad of government agencies having the power to lend (each based on Congressional determination that the particular lending power authorized is in the national interest) are, by reason of routine administrative control over sufficiency of collateral, vested with implied power to carve out of the national economy exempt enclaves in which borrowers may deal free of the antitrust laws.

The REA Act, and its Congressional history, reveal no purpose of granting any power to the Administrator to operate free of national antitrust policy.[16]

It is beyond question that the purpose of the central station service provision of § 904 was to give private utilities some measure of protection from competition created as a result of

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[16] If he had any implied power there would be an additional question of the scope of it—i.e., can he exclude a private utility as a competitor; can he require a private citizen to make an exclusive dealing contract as a condition of a loan?

REA loans.[17] Protection from lawful competition of REA-financed borrowers has been held not a constitutional entitlement and a matter for relief solely in Congress. But it flies in the teeth of the Congressional intent expressed in § 904—protection of private utilities from a described area of competition—to distill the same § 904 into an authorization to the Administrator to require, with impunity and immunity, action that freezes out the private utility as a competitor. By some unrevealed process of alchemy the partial shield given the private utility against the REA borrower by § 904 is converted into a sword in the borrower's hands.

The authorities relied on by the majority for a general principle of governmental exemption from the antitrust laws do not support so broad a pronouncement.

Parker v. Brown, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943), was concerned with action by the State of California in setting up a raisin marketing program. The state command vel non was held the act of the sovereign, not forbidden by the Sherman Act.[18] *E. W. Wiggins Airways, Inc. v. Massachusetts Port Authority*,[19] and *Miley v. John Hancock Mut. Life Ins. Co.*[20] are concerned with sovereign immunity of the state and follow *Parker v. Brown*.

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17 See *Hearings on S. 3483 Before the House Comm. on Interstate and Foreign Commerce*, 74th Cong., 2d Sess. 30, 56-57, 72-73 (1936). See also the floor debates in both the House, 80 Cong. Rec. 5295, 5307, 5308 (1936), and the Senate, 80 Cong. Rec. 3305-06 (1936). Mr. Rayburn summarized the purpose of the bill during the House debate:

> "May I say to the gentleman that we are not, in this bill, intending to go out and compete with anybody. By this bill we hope to bring electrification to people who do not now have it. This bill was not written on the theory that we were going to punish somebody or parallel their lines or enter into competition with them. . . ."

80 Cong. Rec. 5283 (1936).

18 The Court pointed out, "we have no question of the state or its municipality becoming a participant in a private agreement or combination

Eastern R.R. Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed. 2d 464 (1961), held that a violation of the Sherman Act cannot be predicated upon attempts to influence the passage or enforcement of laws. The Court distinguished between an agreement jointly to seek legislation or law enforcement and agreements traditionally condemned by the Sherman Act, and it warned against treating defendants' conduct as though it were a common-law trade restraint. Presumably the majority refer to the first sentence of the following part of the opinion:

> Accordingly, it has been held that where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, no violation of the Act can be made out. These decisions rest upon the fact that under our form of government the question whether a law of that kind should pass, or if passed be enforced, is the responsibility of the appropriate legislative or executive branch of government so long as the law itself does not violate some provision of the Constitution.

The limiting language of the second sentence makes quite plain that the governmental action referred to is of the particular

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by others for restraint of trade," (317 U.S. 351-52, 87 L.Ed. at 326) and, "the state in adopting and enforcing the prorate program made no contract or agreement and entered into no conspiracy in restraint of trade or to establish monopoly but, as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit." (317 U.S. at 352, 87 L.Ed. at 327).

19 362 F.2d 52 (1st Cir. 1966). There is an over-broad dictum in Wiggins of a general governmental immunity. There was no conspiracy in the case, only a "simple agreement or arrangement."

20 148 F.Supp. 299 (D. Mass.), *aff'd*, 242 F.2d 758 (1st Cir. 1957).

kind before the Court. Primarily the Court was concerned with protecting the legislative process. It speaks (365 U.S. at 136-37, 5 L.Ed. 2d at 470-71) of associations seeking to persuade the legislative or executive to take particular action with regard to passage or enforcement of laws, of the significance in a representative democracy of the people making their wishes known to their representatives, and the constitutional issue of the right to petition.

United Mine Workers v. Pennington, 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed. 2d 626 (1965), was concerned with joint efforts of private citizens to influence public officials, approaches to the Secretary of Labor by union and large companies to establish a minimum wage under the Walsh-Healey Act[21] which would make it impossible for smaller companies to compete. The plaintiff was held, under *Noerr*, not entitled to damages arising from the Secretary's Walsh-Healey determinations, not because of any governmental immunity but because his action was "the act of a public official who is not claimed to be a co-conspirator." (381 U.S. at 671, 14 L.Ed. 2d at 637). The REA Administrator is claimed to be a conspirator.[22]

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[21] 41 U.S.C.A. § 35 et seq.

[22] The first holding of *Pennington* was that a concerted effort to influence public officials is regardless of intent not within the Sherman Act. There is no such question in the present case, but the holding is a recognition that *Noerr* is about a particular kind of governmental action.

Additional judicial recognition that *Noerr* does not establish a carte blanche governmental immunity is *Harman v. Valley Nat'l Bank*, 339 F.2d 564 (9th Cir. 1964):

> "Nonetheless, *Noerr* does not necessarily bar relief under the present complaint. The complaint can be read as alleging that appellees' joint effort to influence the Attorney General was but one element in a larger, long-continued scheme to restrain and monopolize 'commercial banking in particular and the financial industry in general within the State of Arizona.' Moreover, the complaint alleges that the acts of the Attorney General were those of a participating conspirator. In Parker v. Brown, 317 U.S.

Stroud v. Benson, 155 F.Supp. 482 (E.D.N.C. 1957), refers to sovereign immunity to the antitrust laws, quoting the *Parker v. Brown* language concerning state action (which was not involved). There was no allegation of conspiracy, only of the validity of an order of the Secretary of Agriculture, and there was no restraint of trade.

The cases do not support a proposition of general governmental immunity. If there is such a principle Congress has been proceeding for a long time under a misapprehension in providing for government officers, and those with whom they deal, exemptions which are specific in nature and varying in scope.

III. The material issues of fact

The majority acknowledge a possible application of the antitrust laws if the Administrator went beyond the outer perimeter of the authority granted him by statute.

The motions to dismiss were submitted to the district court, along with the motions for summary judgment and motion for preliminary injunction, on the pleadings, affidavits, exhibits, and briefs and argument. The district court and the majority in this court have drawn freely on the affidavits and exhibits to support their conclusions. The Complaint and answer alone, but in sharpened form when aided by the other pleadings and the supporting affidavits and exhibits, squarely raise a factual issue

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341, 351, 63 S.Ct. 307, 314, 87 L.Ed. 315 (1943), the Court specifically reserved the question of the applicability of the Sherman Act to the case of 'a state or its municipality becoming a participant in a private agreement or combination by others for restraint of trade,' and Noerr does not hold that the Act would be inapplicable in such a situation."

339 F.2d at 566.

of whether the Administrator is acting within or without his outer limits. That question of fact was not determined by the district court.

In this court the majority say that to require or permit a fact-finding body to determine the outer perimeter boundaries, or 'the range of permissible choices contemplated by the statute,' would defeat the reasons for recognition of the privilege of government officials against suit, relying upon *Barr v. Matteo,* 360 U.S. 564, 79 S.Ct. 1335, 3 L.Ed. 2d 1434 (1958). I do not understand this statement. *Barr* itself, as have numerous other cases, determined outer perimeter boundaries:

> The fact that the action here taken was within the outer perimeter of petitioner's line of duty is enough to render the privilege applicable, despite the allegations of malice in the complaint. . .

360 U.S. at 575. See also *Norton v. McShane,* 332 F.2d 855, 862 (5th Cir. 1964). To couple a privilege for acts done within the perimeter with immunity from judicial investigation of where the perimeter lies, or where the "permissible choices" end, would expand the privilege into immunity for any act done.

The privilege originated with judicial officers, but has been extended to some executive officers. It has its greatest vitality in the field of defamation, but by implication has been extended to civil torts generally. *Norton v. McShane, supra* footnote 2, 332 F.2d at 858. The privilege seems to me to have the least force, if any force at all, in the case where the executive officer's authority—his "permissible choices"—and the wrong against which privilege is asserted both are created by

Congressional enactment. The privilege of the officer and the Congressional authority to grant or withhold immunity from the statutory wrong then pull in opposite directions. To give effect to privilege in that situation is to grant by indirection an immunity to a statutory offense which Congress, in creating the offense, saw fit to withhold. The government officer may not thus insulate himself from Congressional intent.

While disclaiming the propriety of any fact finder's doing so the majority make a finding that the Administrator did not go beyond his outer perimeter or exceed his "permissible choices," basing it on customary REA practice and his affidavit reciting his "policy reasons" for approving the loan. That finding, not made by the district court, is inappropriately made by an appellate court. It is not sustained by the record, which shows that whether the Administrator was within the outer limits of his authority is a serious, disputed and material issue of fact.

The complaint alleges repeatedly that the proposed loan, and the proposed use of the loan funds, violate the central station service requirements of §904.[23] The position of the defendants on these allegations is far from clear. The loan commitment letter of REA to AEC contains several conditions but none limiting use of the funds to the statutory purpose. As part of a petition to secure the state consent required by the third proviso of §904 there were filed with the Department of Finance of the State of Alabama resolutions of the Board of Trustees of AEC. They call for construction and operation of "generating facilities and additional electric transmission, distribution and service lines, together with all necessary

[23] " The Administrator is authorized and empowered . . . . to make loans for rural electrification . . . for the purpose of financing the construction and operation of generating plants, electric transmission and distribution lines or systems for the furnishing of electric energy to persons in rural areas who are not receiving central station service."

appurtenances, in rural areas in [describing the areas], and along such routes as shall be approved by the Administrator of the Rural Electrification Administration for the purpose of furnishing electric energy to consumers not receiving central station electric service."[24] Whether routes approved by the Administrator may be in non-rural areas, and whether "consumers not receiving central electric station service" may be in non-rural areas, depend on construction of the resolutions.

A feasibility study was made for AEC by a consulting engineering firm, which on January 8, 1962 reported to AEC.[25] It makes no mention of the statutory standard of § 904. It does not state who the "additional members" are and where located.

The Power Company asserted before the Department of Finance of Alabama its contention that § 904 was being violated. The Department made no finding thereon, saying tersely that AEC's proposal "serves some public need and is in the public interest." On limited review of the Department's action by certiorari the state circuit court quashed the order of the Finance Department as not supported by sufficient competent evidence. It found the § 904 purpose was not

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[24] This petition also says that AEC furnishes electricity to named electric cooperatives and industrial plants and that it indirectly serves electric needs of over 25,000 farm families, 9,900 residential consumers, and in excess of 7,600 industrial and other users.

[25] The report says:

"Expansion of the power supply and transmission facilities of your Cooperative is required to meet the following objectives: (a) To serve increasing electric demands of member systems. (b) To provide improved service to additional members. (c) To reduce power costs. (d) To transmit power from Southeastern Power Administration (SEPA) to member cooperatives as preference customers. As a result of engineering studies which have been made, a plan of expansion is developed which will achieve the above objectives."

complied with.[26] On appeal the Alabama Supreme Court reversed and rendered because the circuit court had applied the wrong standard of review. *Alabama Elec. Co-op., Inc. v. Alabama Power Co.*, 278 Ala. 123, 176 So. 2d 483 (1964). It declined to pass on the central station service issue, pointing out, inter alia, that in the *Kansas City* case there had been a decision on the merits in the district court that the contract in question did not violate the central station provisions.

When the case now before us reached the district court defendants filed the affidavit of Administrator Clapp. Pertinent extracts referring to the purposes of the loan are set out in the margin.[27] This is the same affidavit from which the statement of "policy reasons" quoted by the majority is taken.

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[26] "It is also undisputed that this multi-million dollar expenditure of Federal funds by AEC is not designed to deliver central station electric service to persons in rural areas who are not already receiving central station service or have it available on application." Alabama Power Co. v. Alabama Elec. Co-op., Inc., No. 3519 (Ala. Cir. Ct., July 9, 1963).

[27] "Such facilities [to be constructed with the proceeds] were intended to be used to supply electric power needs of [describing cooperatives] . . . to enable them to furnish electric energy to their member-consumers who, *being persons in rural areas not receiving central station service, were supplied with electric energy for the first time through electric facilities financed by REA*, pursuant to 7 U.S.C. 901 et seq. . . ."

"In addition to the use of the facilities to supply the cooperatives described in the preceding paragraph concerning which plaintiff complains, such facilities were also intended to be used to serve the electric power needs of certain other Alabama and Florida electric distribution cooperatives, and of AEC, to enable them similarly to (1) furnish electric energy to their member-consumers who, *being persons in rural areas not receiving central station service, were supplied with electric energy for the first time through electric facilities financed by REA pursuant to the RE Act;* or (2) enable them to continue to furnish electric service to those of their consumers who are supplied electric energy through electric facilities acquired by AEC or a member thereof with the proceeds of loans made by REA, pursuant to the RE Act, as a necessary [sic] and incidental means of extending service to unserved persons in rural areas, and as a means of

Possibly the affidavit is an effort to assert facts within the construction of "central station service" reached by the district court in the *Kansas City* case, *Kansas City Power & Light Co. v. McKay*, 115 F.Supp 402 (D. Ct. D. C. 1953), that loan agreements were within the § 904 requirement when providing for a successive loan (to a cooperative originally financed by REA) to meet increasing power requirements of members presently being served and to supply the demand for service from new consumers in surrounding areas denied such service except for the assistance of REA. The difficulty is that some of the Administrator's statements of fact are controverted by the complaint and by affidavits filed in the district court by the Power Company, setting out that consumers of some of the member cooperatives said by Clapp to have been supplied with electric energy for the first time through electric facilities

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providing generating and transmission facilities to supply the needs of the consumers served by AEC and its members. All of the electric distribution cooperatives referred to above are members of AEC and are hereinafter collectively called 'Members'."

* * *

Elsewhere in his affidavit the Administrator states he approved the loan because it would effectuate the policies and purposes of the REA Act in these respects:

"(a) The loan will result in power cost savings to AEC and the Members, thus assisting them in rendering electric service to their consumers at the lowest cost consistent with sound economy and prudent management of their enterprises:

"(b) The loan will help protect the Members in their ability to make the most effective use of their REA-financed systems through continued service to all their existing member-consumers and extension of service on an area coverage basis to new retail electric loads which will arise in the service areas which the Members have developed through construction and acquisition of said systems and the extension of service therefrom;

"(c) By helping the Members make the most effective use of their REA-financed systems, the loan will enable them to further the achievement of the purposes and policies of the RE Act in Alabama by providing service to their approximately 81,000 member-consumers, and others in their service areas, who may be without central station service, under conditions which will make available the full benefits of electric service for the member-consumers and the service areas of the Members."

financed by REA in fact had been in the past, and are at present, supplied with central station service by the Power Company. A Power Company affidavit says: "As a matter of fact, the major portion of the proposed expanded project of Alabama Electric Cooperative is to furnish electric service to persons who have been, were at the time the loan was approved and are now being supplied by central-station electric power generated in central stations of Alabama Power Company and Gulf Power Company."

The district court in *Kansas City* made its findings after a three-weeks trial, expert testimony and numerous exhibits. In the case before us the district court made no findings.[28] From this record it is impossible to determine with any degree of assurance that the proposed loans are within the Congressional authority granted by § 904. It is impossible to tell whether the Administrator has correctly acted in accord with the statutory purpose, or has gone beyond his outer periphery, or is in an intermediate zone in which he has made an administrative decision which though erroneous is not beyond his outer limits.[29]

The factual issues drawn are not answered by case law that when the Administrator is acting within the periphery of his authority the national policy of aid to rural electrification prevents judicial review of his action.

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[28] The state circuit court, the only body yet to make a finding on the issue of central station service (other than the one-sentence finding by this court) was reversed but on other grounds. *See* note 26 *supra* and accompanying text.

[29] The Power Company contends that one of the reasons for requiring the exclusive dealing contracts arises from the fact that the central station service provisions are being violated, i.e., that the contracts are the means adopted by the Administrator to eliminate the competition which will ensue between the distributing cooperatives and the existent suppliers. Like other factual issues, this cannot be resolved on motion to dismiss.

Disposition of the case without hearing and findings of fact makes impossible another pertinent inquiry. The character and quality of acts done by the Administrator and their impact as restraints on trade and competition are relevant on several issues—relating to immunity and standing—whether there was Congressional intent to exempt acts of this general character and of this specific nature, and the weight to be given to the acts done in the balancing of rural electrification and antitrust policies. Valid determinations cannot be reached in this case without factual data that definitively presents just what it is that the Administrator and the private citizens have required, agreed upon and done, and the impact thereof on the relevant market. The issues cannot be resolved in a vacuum nor on the basis that the facts are undisputed, for they are not.

IV. Standing

On its antitrust theory the Power Company claims standing under Sections 4 and 16 of the Clayton Act, 15 U.S.C.A. §§15 & 26, and asserts substantive violations of Section 3 of the Clayton Act, 15 U.S.C.A. §14, and Sections 1 and 2 of the Sherman Act, 15 U.S.C.A. §§1 & 2.

In concluding that there is no standing under the antitrust laws the majority, as did the district court, treat this case as one more in the line of *Ickes*,[30] *TVA*,[31] *Kansas City*[32] and *Central*

[30] *Alabama Power Co. v. Ickes*, 302 U.S. 464, 58 S.Ct. 300, 82 L.Ed. 374 (1938).
[31] *Tennessee Elec. Power Co. v. TVA*, 306 U.S. 118, 59 S.Ct. 366, 83 L.Ed. 543 (1939).
[32] *Kansas City Power & Light Co. v. McKay*, 225 F.2d 924 (D.C. Cir. 1955), *reversing* 115 F. Supp. 402 (D.D.C. 1953), *cert. denied*, 350 U.S. 884, 76 S.Ct. 137, 100 L.Ed. 780 (1955).

Louisiana.[33] Those cases do not reach the issue before us. They represent a succession of efforts by private utilities to establish standing by combining a charge that the government officer was making an unauthorized loan (or otherwise acting outside his authority) with a charge that the purpose or effect was to create competition for the plaintiff, this combination being then characterized as "unlawful competition" or "conspiracy." These efforts were rebuffed, because review of loans is for Congress and not the courts, and the private utilities have no legally protectible right to freedom from competition.

Those established principles have no application to a complaint by the private utility of actions which in themselves are monopolistic in nature and violate the antitrust laws. The actions here charged draw their characteristics of invalidity from their own nature and impact, not from efforts to create a synthesized illegality. The Power Company does not complain of the "mere competition" of *Central Louisiana* or the lawful competition of *TVA* and *Kansas City* but of unlawful competition, exclusive dealing contracts and coercion. There is no national policy to create monopoly, or unlawful competition, or engage in coercion, in the name of competition. "Competition" is not a magic word which when uttered dispenses with consideration of what as a matter of fact is being done and what as a matter of law and national policy are the consequences.

Ickes was a suit for general equitable relief not under the antitrust laws. The Supreme Court declined to enjoin

[33] *Rural Electrification Administration v. Central Louisiana Elec. Co.*, 354 F.2d 859 (5th Cir. 1966), *reversing* 236 F.Supp. 271 (W.D. La. 1964), *cert. denied*, 385 U.S. 815, 87 S.Ct. 34, 17 L.Ed. 2d 54 (1966).

agreements and grants for municipal electric systems "on the sole and detached ground that the Administrator lacks constitutional and statutory authority to make them, and that the resulting moneys, which the municipalities have clear authority to take, will be used by the municipalities in lawful, albeit destructive, competition with petitioner." The Court referred to the finding of the district court that the contracts did not require the municipalities to eliminate competition or designate the source from which they must purchase power. The Court referred numerous times to the competition as lawful, noted that there was no conspiracy and made the oft-repeated dictum, "If conspiracy or fraud or malice or coercion were involved a different case would be presented."[34]

TVA also was not filed under the procedural provisions of the antitrust laws but was for general equitable relief, and on the theory public power competition was illegal because it injured property rights represented by the private franchises. The Supreme Court pointed out that possession of the franchises did not render competition illegal and conferred no contractual or property right to be free of competition. There had been specific findings by the district court that the Tennessee Valley Authority had not conspired or coerced.[35] The Court made clear the distinction between unlawful conspiracy

[34] In *Duke Power Co. v. Greenwood County*, 302 U.S. 485, 58 S.Ct. 306, 82 L.Ed. 381 (1938), decided the same day, the proposed competition had been held by the district court to be lawful, and there was no finding of conspiracy.

[35] "The District Court finds that the Authority has not indulged in coercion, duress, fraud, or misrepresentation in procuring contracts with municipalities, cooperatives or other purchasers of power; has not acted with any malicious or malevolent motive; and has not conspired with municipalities or other purchasers of power. The record justifies these findings." 306 U.S. at 145, 83 L.Ed. at 553.

and lawful cooperation by government officials leading to lawful competition.[36]

Kansas City is inapplicable for two reasons. First, no cause of action was asserted under the antitrust laws (see 225 F.2d at 936). The suit was for declaratory judgment based on the Rural Electrification Act[37] and the Flood Control Act of 1944,[38] neither of which is a statutory provision designed to protect competition.[39] Second, the nature and quality of the acts charged were such that as a matter of law there was no "conspiracy." *Kansas City*, as had *Ickes*, teaches that the spectrum of dealings between private citizens and government officials is not made a "conspiracy" by the fact alone that the official exceeds his authority. In neither case was there action which carried within itself the seeds of restraint or monopoly.[40]

Central Louisiana was a suit for temporary injunction to prevent the REA from consummating a loan. It did not involve standing under Sections 4 and 16 of the Clayton Act. In the

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[36] "Cooperation by two federal officials, one acting under a statute whereby funds are provided for the erection of municipal plants, and the other under a statute authorizing the production of electricity and its sale to such plants, in competition with the appellants, does not spell conspiracy to injure their business. As the court below held, such cooperation does not involve unlawful concert, plan, or design, or cooperation to commit an unlawful act or to commit acts otherwise lawful with the intent to violate a statute." 306 U.S. at 146-47, 83 L.Ed. at 554.

[37] 7 U.S.C.A. § 901 et seq.

[38] 33 U.S.C.A. § 701l et seq.; 16 U.S.C.A. § 825S et seq.

[39] See the discussion of *Hardin v. Kentucky Utilities Co.*, ... U.S. . . ., 88 S.Ct. . . . ., 19 L.Ed. 2d 787 (1968), *infra*.

[40] This is the point which Judge Washington in *Kansas City* seeks to make in his reference to *Ickes*. It is the same point made by Judge Coleman in *Central Louisiana*, that lawful competition plus excess of statutory authority do not constitute the kind of "conspiracy" the court had in mind in *Ickes*. 354 F.2d at 866.

district court Judge Dawkins held plaintiff had made out a prima facie case of illegal competition and coercion and granted the temporary injunction. On appeal this court reversed, holding that there was not raised anything more than "mere economic competition made possible by governmental action." It reinforced this conclusion by the further statement that "their [appellees] only standing for this [that the loan was illegally made and would cause illegal consequences] is their natural opposition to having territory invaded which heretofore has been de facto their sole domain but in which they have no exclusive right." 354 F.2d at 865.

Central Louisiana dealt with invasion of the private utility's territory by a "mere competitor." We deal in this case with ouster of the private utility from a market by a borrower under a monopolistic contract. Whether exclusive dealing contracts standing alone violated the antitrust laws, and whether as a part of the overall dealings they violated the antitrust laws and thereby caused the overall dealings to be in violation, were matters not decided in *Central Louisiana*. There are references to 35-year requirement contracts (see 354 F.2d at 863) but no such contracts had been executed (although it was recognized the Administrator would require them) and neither AEC nor the distributor cooperatives were parties to the suit.[41]

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[41] About as close as the court came to considering the contracts is the statement (354 F.2d at 864):

> "The appellees have been and are now doing business with cooperatives established and financed under the REA Act. The record shows no intention or attempt to abrogate *existing contracts* between the parties. Appellees do not have a Constitutionally guaranteed, unrestricted privilege to engage in business free of competition."

If this means that exclusive dealing contracts violate the antitrust laws only if they abrogate existing contracts between one of the parties thereto and others, then it is wrong and the quicker corrected the better. The right of the private utility is that it not be foreclosed from the market, which may or may not involve breach of an existent contract.

Rural Electrification Administration v. Northern States Power Co., 373 F.2d 686 (8th Cir. 1967), considers standing under the Administrative Procedure Act and under the REA Act itself. It does not reach the antitrust issue.

This brings us to the latest chapter. In *Kentucky Utilities Co. v. TVA*, 375 F.2d 403 (6th Cir. 1966), *rev'd sub nom. on other grounds, Hardin v. Kentucky Utilities Co.*, . . . : U.S. . . ., 88 S.Ct. . . ., 19 L.Ed.2d 787, (1968), the private power company sought an injunction restraining TVA, its distributor (an electric cooperative), and mayors of cities concerned, who were charged with a conspiracy by which the cooperative would take over the supply of electric power to the cities in violation of 16 U.S.C.A. § 831 n–4(a) forbidding TVA from making new contracts to supply power outside the area for which it or its distributors were the primary source of power on July 1, 1957. The district court found against the private power company on the merits but held it had standing to sue. 237 F.Supp. 502 (E.D. Tenn. 1964). The Court of Appeals affirmed on standing to sue, pointing out that the court did not ask a decree protecting it from all competition but from violation of the statute, which had been enacted to protect established utilities from intrusion by TVA into areas where such utilities already were established. Of significance on the matter of standing to sue under the antitrust laws, the court distinguished *Ickes, TVA* and *Kansas City:*

> All of them involve efforts by private utitlities to get court relief from the competition of publicly owned or supported power facilities which were creatures of the Federal Government's entry into the power business. The right to sue

> and the asserted ground for relief in each case were bottomed upon broad claims of unconstitutionality of the federal power program, illegality in the means whereby competitors of private utilities had or would obtain the funds to set up their operations and other charges of illegality in the establishment of the plaintiffs' competitors. Such plaintiffs were held to be without standing to sue. Their surfact analogy is immediately dissipated by the fact that in none of them was the plaintiff's suit planted on a federal statute enacted specifically for the protection of the involved plaintiff. The plaintiff utilities did not have exclusive franchises, and the cases hold that where there is no constitutional or common law right to be free of competition and where the hurting competition is valid as competition, the courts will not restrain it because of some antecedent illegality in its creation or in its obtaining of funds.

The Supreme Court affirmed on standing to sue, distinguishing "lawful competition" cases (including *TVA),* in which "competitive injury provided no basis for standing. . . . simply because the statutory and constitutional requirements that the plaintiff sought to enforce were in no way concerned with protecting against competitive injury," from the contrasting cases in which "the particular statutory provision invoked does reflect a legislative purpose to protect a competitive interest, the injured competitor has standing to require compliance with that provision." The power company had standing because it "is thus in the class which § 15d is designed to protect." *Kansas City* was characterized as holding that an injured competitor

cannot sue to enforce statutory requirements not designed to protect competitors [in that case not the antitrust laws but the REA Act and the Flood Control Act of 1944].

It seems to me beyond rational question that the antitrust laws were designed to include competitors as among those protected. As much is conceded by REA in its latest brief:

> We stress, however, that, if Alabama Power Co. could not bring suit, it would be solely because of an absence of a legally cognizable injury to it and not because it was the Alabama Power Co. In short, contrary to appellant's implication, we have never suggested that the principles governing its standing to sue are any different than those applicable to other parties.

Specifically, § 16 of the Clayton Act provides for the right of the private party to sue for injunctive relief against threatened loss or damage by violation of the antitrust laws.

Insofar as the antitrust laws are concerned, this court need not pause on the inquiry—over which the parties do mighty battle in their briefs—of attack on the loan vs. attack on the requirement contracts as an incident of the loan. The Power Company has standing to attack the contracts standing alone, whether or not the Administrator is a formal party thereto, and to attack the broader range of activities of which the contracts are a part and in which the parties defendant are charged as participants.

I agree with my brothers that REA is an instrument chosen by Congress to bring abundant and low cost power to our rural citizens and is not just another utility. But that characterization

does not answer whether it is to be given an implied immunity to deal free of antitrust law and national antitrust policy.

APPENDIX A—JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1966

No. 23016

D. C. Docket No. CA 2193 N

ALABAMA POWER COMPANY,
Appellant,

versus

ALABAMA ELECTRIC COOPERATIVE, INC., ET AL.,
Appellees.

Appeal from the United States District Court for the Middle District of Alabama.

Before RIVES, GEWIN and GODBOLD, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

GODBOLD, Circuit Judge, dissents.

April 2, 1968

Issued as Mandate:

APPENDIX A—OPINION ON REHEARINGS

IN THE

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 23016

ALABAMA POWER COMPANY,
Appellant,

versus

ALABAMA ELECTRIC COOPERATIVE, INC., ET AL.,
Appellees.

Appeal from the United States District Court for the Middle District of Alabama

(July 11, 1968)

ON PETITION FOR REHEARING

Before RIVES, GEWIN and GODBOLD,
Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, Rule 25(a), subpars. (a)(b), the Petition for Rehearing En Banc is also DENIED.

Godbold, Circuit Judge, dissents.

APPENDIX B—OPINION AND ORDER OF DISTRICT COURT

IN THE
UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA,
NORTHERN DIVISION

ALABAMA POWER COMPANY,
a corporation,

Plaintiff,

CIVIL ACTION NO. 2193-N

vs.

ALABAMA ELECTRIC CO-OPERATIVE, INC., a corporation; RURAL ELECTRIFICATION ADMINISTRATION; NORMAN M. CLAPP, Administrator of the Rural Electrification Administration; THE UNITED STATES DEPARTMENT OF AGRICULTURE; and ORVILLE L. FREEMAN, Secretary of the United States Department of Agriculture,

Defendants.

MEMORANDUM OPINION AND ORDER

This is an action by the Alabama Power Company against Alabama Electric Cooperative, Inc., the Rural Electrification Administration, Norman M. Clapp, Administrator of the Rural Electrification Administration, the United States Department of

Agriculture, and Orville L. Freeman, the Secretary of the United States Department of Agriculture, asking this Court to enjoin the defendants from consummating a proposed loan of $20,350,000 to the Alabama Electric Cooperative, Inc., which loan was approved by the Administrator of the Rural Electrification Administration on October 31, 1961.[1] Each of the defendants has filed motions asking this Court to dismiss the complaint and in the alternative for summary judgment. The Alabama Power Company has moved for a preliminary injunction prohibiting the defendants from consummating the loan. Each of these several motions is now submitted upon the pleadings, the affidavits and the several exhibits thereto, which were timely and properly filed with the Clerk of this Court, and the briefs and arguments of the parties.

The Alabama Power Company is a public utility corporation organized under the laws of the State of Alabama and is authorized by its charter to generate, transmit and sell electric energy throughout the State of Alabama. It possesses certificates of convenience and necessity from the Alabama Public Service Commission for the construction of its several steam and hydroelectric generating plants, together with connecting transmission facilities located throughout the State of Alabama, exclusive of a section in north Alabama where electric service is supplied by the Tennessee Valley Authority. In addition, the Alabama Power Company holds nonexclusive franchises from 56 counties and 257 municipalities in the State of Alabama. It is in these counties and municipalities that the Alabama Power Company conducts its electrical operations.

[1] For brevity, the Rural Electrification Administration will be hereinafter referred to as the "REA" and the Alabama Electric Cooperative, Inc., as the "AEC."

The AEC was organized and exists under the Alabama Electric Cooperative Act (Title 18, § 31, et seq., Code of Alabama, Recompiled). The cooperative is composed of twenty members, the membership consisting of two industrial consumers served at retail by the cooperative, six Alabama municipalities owning distribution systems served at wholesale by the cooperative, and twelve electric cooperatives, which furnish electric energy through distribution systems financed by the REA pursuant to Section 4 of the Act (7 U.S.C.A. § 904). At present, two of the member cooperatives receive all their electric power requirements at wholesale from the AEC; four obtain part of their power requirements at wholesale from the AEC, and the remainder from the plaintiff, Alabama Power Company, or Gulf Power Company; the other six member cooperatives at the present time obtain all their power requirements from either the Alabama Power Company or the Gulf Power Company. The AEC was organized by electric distribution cooperatives for the purpose of providing themselves with electric power and energy needed by them to satisfy the electrical requirements of their member-consumers. The power presently being supplied by the Alabama Power Company to the distributing cooperatives is provided pursuant to 5-year contracts, each of which has been approved by the Alabama Public Service Commission. The revenues received by the Alabama Power Company from the sale of the electric power to these cooperatives is substantial; for example, the revenue received by the Alabama Power Company from these cooperatives increased from over $1-1/2 million in 1960 to approximately $2-1/3 million in 1964. There is no question that the Alabama Power Company has made a substantial investment in its electric system, including its transmission lines and substations. This investment has been for the purpose of

providing electric power requirements to its customers, including the cooperatives. The Alabama Power Company has offered and continues to offer the sale of electric power to these cooperatives at the same rates at which it has sold power to such cooperatives since the last rate established and approved by the Alabama Public Service Commission. In addition to the transmission and sale of electric power to the distributing cooperatives, the Alabama Power Company since 1944 has supplied a substantial portion of the electric power required by the defendant AEC and as with the cooperative that distributes the power, the Alabama Power Company has offered and continues to offer to supply the AEC its deficit power requirements in order to fulfill the needs of its customers.

In October, 1959, the AEC initiated an application to the REA for the purpose of obtaining a loan in an amount in excess of $20 million for the purpose of constructing a generating plant in southwest Alabama, together with several hundred miles of transmission lines and related substations to be used to provide electric energy to the several member distributing cooperatives, which energy was at that time, and is presently, being provided by the Alabama Power Company and by Gulf Power Company. This loan application was revised in April, 1961. The revision is inconsequential insofar as the issues now presented to this Court are concerned. In connection with the processing of this revised loan application, the REA instructed the AEC to obtain from each of the electric distribution cooperatives wholesale power supply agreements requiring each of such cooperatives for a period of thirty-five years to purchase all their wholesale power requirements from the defendant AEC and to require such distributing cooperatives to discontinue the purchase of power from any supplier other than AEC.

Accordingly, the AEC undertook to and did obtain the contracts from the distributing cooperatives. Subsequently, the defendant Norman M. Clapp, Administrator of REA, entered into a contract on behalf of the United States of America with the defendant AEC, this contract being dated July 31, 1961, whereby an agreement was made to lend $20,350,000 to AEC for the purposes aforestated. The loan commitment was made subject to the conditions that AEC secure written approval from the Director of Finance for the State of Alabama and that AEC complete the 35-year wholesale power supply contracts with the distributing cooperatives. Subsequently, AEC filed its petition with the Director of Finance for the State of Alabama, seeking an order from the director to the effect that the purposed project serves a public need and is in the public interest and that the issuance of obligations on the part of AEC in the amount of $20,350,000 and the use of the proceeds of such loan for such purpose would further the corporate purposes of AEC.

The Alabama Power Company intervened in the proceedings before the Alabama Director of Finance, this intervention occurring some three years ago; the basis for the intervention by the Alabama Power Company in that proceeding was that the proposed loan would not serve a public need, nor be in the public interest; that the Alabama Power Company had adequate facilities to supply and would supply the power needs of consumers to be served by facilities to be financed with the loan; that the proposed generating and transmission system is unnecessary and will constitute duplication of the Alabama Power Company's electric system; that the loan is in violation of the central station service limitation of the Rural Electrification Act; that the interest charge on the loan is less than the United States must pay on its borrowings, and several

other grounds not considered to be material to the issues now presented. After extensive proceedings, the Director of Finance for the State of Alabama on January 9, 1963, rendered a decision in favor of the AEC and specifically found that the proposed project by the AEC and the loan that was being obtained by that cooperative from the REA would serve a public need and would be in the public interest. On the same day the Alabama Director of Finance rendered his decision, the Alabama Power Company filed a petition in the Circuit Court of Montgomery County, Alabama, seeking a judicial review in the Alabama State Court of the action of the Director of Finance. In July, 1963, the Circuit Court of Montgomery County, Alabama, quashed the order of the Director of Finance and remanded the case to him. From this order the AEC appealed to the Supreme Court of Alabama, and in September, 1964, the Supreme Court of Alabama reversed the Circuit Court and upheld the approval by the Director of Finance of the AEC proposal. Subsequently, the Alabama Power Company on two occasions applied to the Supreme Court of Alabama for a rehearing. In each instance the application was denied. The complaint in this Court was filed one day after the Supreme Court of Alabama denied the initial application of the Alabama Power Company for a rehearing.

As stated above, Section 4 of the Rural Electrification Act, Title 7, Section 904, U.S.C.A., authorizes the administrator "to make loans . . . for the purpose of financing the construction and operation of generating plants, electric transmission and distribution lines or systems for the furnishing of electric energy to persons in rural areas who are not receiving central station service . . . ." From the Act itself and from its legislative history, it is quite clear that the congressional intent was to benefit those persons in rural areas who were in need of electric power; the Act was in no way intended to benefit or confer

enforceable rights upon the Alabama Power Company or others of its class. The Act, therefore, contains no provision for any notice or hearing or intervention for the challenging of loans to be made under the Act. On this basis this Court concludes that the motions of the AEC, the REA and the other defendants, to dismiss this action, should each be granted for the reason that the Alabama Power Company lacks standing to maintain this action.

A close study of the complaint in this case and the arguments and briefs filed by the Alabama Power Company in support thereof, reflects that the Alabama Power Company's sole complaint is the injury it fears from the competition that it says will result from the electrical facilities to be provided by the AEC by the use of the REA's loan. The law is clear that where prior REA loans have been challenged by plaintiffs' occupying essentially the same status as the Alabama Power Company occupies here and for basically the same reasons that the Alabama Power Company advances here, there is no standing to challenge the loans in a judicial proceeding. *Kansas City Power & Light Co.* v. *McKay*, 225 F. 2d 924, cert. denied 350 U. S. 884; *Alabama Power Company* v. *Ickes*, 302 U.S. 464; *Tennessee Electric Power Company* v. *T.V.A.*, 306 U. S. 118, and *Duke Power Company* v. *Greenwood*, 302 U.S. 485. In this connection, the Circuit Court in *Kansas City* v. *McKay* stated:

> "The statutory scheme now before us clearly contemplates Congressional, rather than judicial, review of the governmental activities here in question, all of which are non-regulatory .... The continuance of defendants' activities here complained of is therefore subject to review by

Congress acting each year on the appropriations sought by the defendants."

In the *Kansas City Power & Light Co.* case, the United States Court of Appeals for the District of Columbia, in denying the right of electric utility companies to attack government financed competition stated:

> "It is indisputable that the essence of plaintiffs' complaint is the competition which they will suffer if the Government's contracts are carried out. They can claim no other interest or injury. The defendants have not undertaken to regulate them in any way. They have not been ordered to abandon any of their activities or to forego the expansion programs planned by them. They have not been subjected to any obligation or duty. Their sole interest and objective is to eliminate the competition which they fear. Controlling decisions of the Supreme Court, dealing with other electric power contracts of the Federal Government, establish that an interest of this kind is not sufficient to enable them to sue to enjoin execution of the power contracts and program of the Government . . . ."

There have been numerous efforts since *Kansas City* v. *McKay*, supra, by public utilities such as the Alabama Power Company to distinguish cases that are factually the same as the case now presented to this Court from the *Kansas City* v. *McKay* doctrine. In this connection, see *Iowa-Illinois Gas and Electric Company* v. *Benson, et al.*, 247 F. 2d 22, cert. denied,

356 U.S. 949, and *Pennsylvania R. Co.* v. *Dillon*, 335 F. 2d 292, cert. denied, 379 U.S. 945. In each instance where the public utility claimed a competitive injury, as the Alabama Power Company does in this case, and sought to base its standing for judicial relief on either the Administrative Procedures Act,[2] the allegation that the action of the REA was arbitrary and capricious, that the action in securing contracts for the purpose of guaranteeing the repayment of the loan constituted a restraint of trade in violation of the Sherman Antitrust Act and the Clayton Act, or that the action of the officials of the REA and the cooperatives securing the loan constituted an illegal combination or conspiracy, such contentions have been fully dealt with by the courts concerned and found to be with merit. *Kansas City Power & Light Co.* v. *McKay*, supra; *Alabama Power Company* v. *Ickes*, supra; *Tennessee Electric Power Company* v. *T.V.A.*, supra; *Duke Power Company* v. *Greenwood*, supra; *Iowa-Illinois Gas and Electric Company* v. *Benson, et al.*, supra; *Pennsylvania R. Co.* v. *Dillon*, supra. Likewise, the argument of unconstitutionality advanced in this case by the Alabama Power Company is based upon the contention that the loan if consummated would violate the due process clause of the Fifth Amendment to the Federal Constitution. This is the same argument that was rejected by the Supreme Court of the United States in *Alabama Power Company* v. *Ickes*, supra, and *Tennessee Power Company* v. *T.V.A.*, supra.

The Alabama Power Company in this case strongly emphasizes its antitrust theory and argues strenuously in support thereof. The action being taken by this Court in

[2] 5 U.S.C.A. §1001 et seq.

dismissing the Alabama Power Company's case for the reason that that company has no standing under the facts in this particular case to maintain this action against these defendants is particularly appropriate insofar as the antitrust argument is concerned. In this connection, see *Eastern Railroad Presidents Conference, et al.* v. *Noerr Motor Freight, Inc., et al.*, 365 U.S. 127, wherein the Supreme Court of the United States stated:

> "... the Sherman Act forbids only those trade restraints and monopolizations that are created, or attempted, by the acts of 'individuals or combinations of individuals or corporations.' Accordingly, it has been held that where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, no violation of the Act can be made out. These decisions rest upon the fact that under our form of government the question whether a law of that kind should pass, or if passed be enforced, is the responsibility of the appropriate legislative or executive branch of the government so long as the law itself does not violate some provision of the Constitution."

In this connection, see also *United States* v. *Rock Royal Co-operative, Inc.*, 307 U.S. 533 and *Parker* v. *Brown*, 317 U.S. 341.

For the foregoing reasons, a formal order will be entered denying the motion of the Alabama Power Company for a preliminary injunction and granting the motions of the defendants to dismiss this action.

Done, this 13th day of July, 1965.

/s/ Frank M. Johnson, Jr.

UNITED STATES DISTRICT JUDGE

APPENDIX B—ORDER OF DISTRICT COURT

IN THE
UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA,
NORTHERN DIVISION

ALABAMA POWER COMPANY,
a corporation,

Plaintiff,

CIVIL ACTION NO. 2193-N

vs.

ALABAMA ELECTRIC CO-OPERATIVE, INC., a corporation; RURAL ELECTRIFICATION ADMINISTRATION; NORMAN M. CLAPP, Administrator of the Rural Electrification Administration; THE UNITED STATES DEPARTMENT OF AGRICULTURE; and ORVILLE L. FREEMAN, Secretary of the United States Department of Agriculture,

Defendants.

ORDER

For the reasons stated in the memorandum opinion of this Court made and filed herein on this date, it is the ORDER, JUDGMENT and DECREE of this Court that the motion of the Alabama Power Company, filed herein on May 20, 1965, asking that this Court enjoin the defendant Alabama Electric

Cooperative, Inc., its agents, servants, employees and attorneys and all persons in active concert and participation with them, from consummating a proposed loan from the Rural Electrification Administration, be and the same is hereby denied.

It is the further ORDER, JUDGMENT and DECREE of this Court that the motion of the Alabama Electric Cooperative, Inc., filed herein on May 7, 1965, asking this Court to dismiss this action, be and the same is hereby granted.

It is the further ORDER of this Court that the motions of the defendants Rural Electrification Administration, Norman M. Clapp, Administrator of the Rural Electrification Administration, the United States Department of Agriculture, and Orville L. Freeman, Secretary of the United States Department of Agriculture, filed herein on June 10, 1965, asking that this cause be dismissed as to each of them, be and the same is hereby granted.

It is further ORDERED that the costs incurred in this proceeding be and they are hereby taxed against the Alabama Power Company, a corporation, for which execution may issue.

Done, this the 13th day of July, 1965.

/s/ Frank M. Johnson, Jr.

UNITED STATES DISTRICT JUDGE

APPENDIX C

Statutes Involved

Section 1 of Sherman Antitrust Act, 15 U.S.C. § 1

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: . . ."

Section 2 of Sherman Antitrust Act, 15 U.S.C. § 2

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, . . ."

Section 3 of Clayton Act, 15 U.S.C. § 14

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other

commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

Section 16 of Clayton Act, 15 U.S.C. § 26

"Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, . . ."

Section 10(a) of Administrative Procedure Act, 5 U.S.C. § 702

"A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

Section 4 of Rural Electrification Act of 1936, 7 U.S.C. § 904

"The Administrator is authorized and empowered, from the sums hereinbefore authorized, to make loans for rural electrification to persons, corporations, . . . for the purpose of financing the construction and operation of generating plants, electric transmission and

distribution lines or systems for the furnishing of electric energy to lines or systems for the furnishing of electric energy to persons in rural areas who are not receiving central station service, . . . Such loans shall be on such terms and conditions relating to the expenditure of the moneys loaned and the security therefor as the Administrator shall determine and may be made payable in whole or in part out of the income: *Provided, further,* That all such loans shall be self-liquidating within a period of not to exceed thirty-five years, and shall bear interest at the rate of 2 per centum per annum; . . ."

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 618

ALABAMA POWER COMPANY, PETITIONER

v.

ALABAMA ELECTRIC COOPERATIVE, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION FOR THE RESPONDENTS RURAL ELECTRIFICATION ADMINISTRATION, NORMAN M. CLAPP, UNITED STATES DEPARTMENT OF AGRICULTURE AND ORVILLE L. FREEMAN

OPINIONS BELOW

The opinion of the district court (Pet. App. 47a–57a) is reported at 249 F. Supp. 855. The opinion of the court of appeals (Pet. App. 1a–44a) is reported at 394 F. 2d 672.

JURISDICTION

The judgment of the court of appeals was entered on April 2, 1968. A timely petition for rehearing was denied on July 11, 1968. The petition for a writ of certiorari was filed on October 8, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the federal antitrust laws apply to the action of the Rural Electrification Administrator in requiring, as a condition to making a loan to a federated rural electric cooperative, that the members of the cooperative agree to purchase from the cooperative all the power they need during the thirty-five year period in which the loan is to be repaid.

STATUTE INVOLVED

Section 4 of the Rural Electrification Act of 1936, 7 U.S.C. 904, provides in pertinent part:

> The Administrator is authorized and empowered, from the sums hereinbefore authorized, to make loans for rural electrification to persons, corporations, * * * for the purpose of financing the construction and operation of generating plants, electric transmission and distribution lines or systems for the furnishing of electric energy to lines or systems for the furnishing of electric energy to persons in rural areas who are not receiving central station service * * *. Such loans shall be on such terms and conditions relating to the expenditure of the moneys loaned and the security therefor as the Administrator shall determine and may be made payable in whole or in part out of the income; *Provided, further,* That all such loans shall be self-liquidating within a period of not to exceed thirty-five years, and shall bear interest at the rate of 2 per centum per annum * * *.

STATEMENT

On October 31, 1961, the respondent Clapp, Administrator of the Rural Electrification Administration ("REA"), approved a proposed loan of $20,350,000 to finance the construction of a generating plant and transmission lines by the respondent Alabama Electric Cooperative, Inc. ("AEC"), a federated cooperative composed primarily of several member distribution cooperatives. When completed, the facilities will provide electric power at wholesale rates to AEC's member cooperatives who, in turn, will distribute the power to their member consumers in rural areas of Alabama. The REA Administrator approved the loan because (1) it would result in power costs to the cooperative and its members lower than those which they would otherwise incur by purchases at wholesale from the petitioner, Alabama Power Company, and another private power company; and (2) the loan would protect the effectiveness and security of AEC and its members against petitioner's efforts to deprive them of existing and potential consumers in their service areas (R. 224–226).[1] The Administrator conditioned the loan, however, on AEC obtaining from its members agreements that they would purchase all their wholesale power requirements from AEC during the 35-year period of the loan.

The Alabama Department of Finance and the Alabama Supreme Court approved AEC's proposed con-

[1] "R." refers to volume I of the Transcript of Record, a copy of which has been lodged with the Clerk of this Court.

struction and its financing (Pet. App. 51a–52a). Petitioner brought this action in the United States district court to enjoin the proposed REA loan, contending, *inter alia*, that compliance with the provisions of the loan agreement[2] would violate the federal antitrust laws because of the requirement that the members of AEC purchase all their wholesale power requirements from it during the 35-year duration of the loan (R. 10–13.)[3]

The district court denied petitioner's motion for a preliminary injunction, and granted the government's motions to dismiss (Pet. App. 47a–59a). The court of appeals affirmed, Judge Godbold dissenting (Pet. App. 1a–46a).

ARGUMENT

1. The court below correctly concluded (Pet. App. 6a) that the complaint did not state a cause of action against the REA Administrator under the antitrust laws based upon his insistence that AEC include in

[2] In 1963, petitioner, which has distribution lines and associated facilities in 55 of the 67 counties of Alabama, sold 45 per cent of the wholesale power, and 65 per cent of the retail power, in Alabama. In that year, AEC sold 5 per cent of the wholesale electric power and .2 per cent of the retail electric power in Alabama. The additional facilities which the proposed REA loan will add to AEC's capacity will increase its proportional sales of wholesale and retail electric power in Alabama to 13 per cent and .23 per cent, respectively (R. 230–231).

[3] Petitioner also claimed below that the REA Administrator erroneously determined that "central station service" was not being supplied to the rural areas involved—a determination which is a prerequisite to the making of an REA loan under 7 U.S.C. 904 (R. 8–9). Petitioner apparently has abandoned that contention in this Court. Cf. note 11, *infra*.

its contracts with its members the requirement that for 35 years they purchase all of their power from it.

a. Official actions of government officers are not subject to injunction under the federal antitrust laws. In *Parker* v. *Brown*, 317 U.S. 341, a raisin producer sought to enjoin state officers from enforcing a California raisin marketing program on the ground, *inter alia*, that it violated the federal antitrust laws. This Court unanimously held that the antitrust laws are not directed at the action of a state or its officers, reasoning (*id.*, at 350, 352; emphasis added):

> [I]t is plain that the [raisin marketing] prorate program here was never intended to operate by force of individual agreement or combination. It derived its authority and its efficacy from the legislative command of the state and was not intended to operate or become effective without that command. *We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature.* * * *
>
> * * * * * *
>
> The state in adopting and enforcing the prorate program made no contract or agreement and entered into no conspiracy in restraint of trade or to establish monopoly but, as sovereign, imposed the restraint as *an act of government which the Sherman Act did not undertake to prohibit.* * * *

A fortiori, if the valid action of state governments is not within the scope of the federal antitrust laws, the official action of *federal* officers is not subject to injunction under those laws. See *United States* v. *Rock Royal Co-op., Inc.*, 307 U.S. 533, 559–560; *United Mine*

Workers of America v. *Pennington*, 381 U.S. 657, 671–672.[4]

This conclusion is strongly supported by this Court's decision in *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127. In that case, the plaintiffs claimed that the antitrust laws were violated by concerted efforts of American railroads to obtain enactment and enforcement of legislation harmful to American truckers. This Court unanimously rejected that contention, finding (*id.* at 137, n. 17) that it was "not unlike" the contention of antitrust violation by state officers in *Parker* v. *Brown*, *supra*. Reiterating its holdings in *Parker* v. *Brown*, the Court stated (365 U.S. at 135–136):

> It has been recognized * * * that the Sherman Act forbids only those trade restraints and monopolizations that are created, or attempted, by the acts of "individuals or combinations of individuals or corporations." Accordingly, it has been held that where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, no violation of the Act can be made out [footnotes omitted].

b. Petitioner contends (*e.g.*, Pet. 10), however, that the REA Administrator's action is not outside the reach of the antitrust laws because he allegedly acted

[4] Obviously, the basis for the decision in *Parker* v. *Brown*, *supra*, is that the antitrust laws are directed at private actions only, so that governmental action within the scope of governmental authority, whether state or federal, is immune from those laws. States as such are not otherwise exempt from federal laws. See, *e.g.*, *California* v. *Taylor*, 353 U.S. 553, applying the Railway Labor Act to the California State Belt Railroad.

beyond his statutory authority in imposing the 35-year, "all-requirements" contracts.[5]

The REA was made a permanent agency of the federal government by the Rural Electrification Act of 1936, 49 Stat. 1363, 7 U.S.C. 901, *et seq.* The purpose of that legislation was to extend the benefits of central station electric power to rural areas without such power. See, *e.g.*, 80 Cong. Rec. 2752. The REA was directed to effectuate that purpose by making loans to finance the construction and operation of generating plants and electric transmission and distribution systems. 7 U.S.C. 901, 904. Such loans may only be made to those who will furnish electric energy to "persons in rural areas who are not receiving central station service * * *." 7 U.S.C. 904.

The Act authorizes the REA Administrator to make loans "on such terms and conditions relating to the expenditure of the moneys loaned and the security therefor as the Administrator shall determine * * *." 7 U.S.C. 904.[6] The statute specifies that such loans "shall

[5] In *Bankers Life and Casualty Co.* v. *Larson*, 257 F. 2d 377 (C.A. 5), certiorari denied, 358 U.S. 879 (Pet. 31), a state officer was required to defend on the merits an antitrust action for treble damages because the court found that the complaint, in that particular case, made specific allegations of misconduct by him beyond his official duties. In *Harman* v. *Valley National Bank of Arizona*, 339 F. 2d 564 (C.A. 9), the other treble damage suit cited by petitioner (Pet. 31), no governmental officer was a defendant.

[6] The legislative history of the Rural Electrification Act confirms the broad discretion which the statutory terms vest in the REA Administrator. See, *e.g.*, the reference by Representative Rayburn, sponsor of the House bill, to the "great power that was given to the Administrator" (80 Cong. Rec. 5281). See also the statement of Senator Norris, sponsor of the Senate bill, that "[w]e must give to the Administrator a very wide

be self-liquidating within a period of not to exceed thirty-five years," and shall bear two percent annual interest. *Ibid.*[7] The Act also provides that the Administrator may make no loans unless he "finds and certifies that in his judgment the security therefor is reasonably adequate and such loan will be repaid within the time agreed" and that before loans for the construction, operation, or enlargement of generating plants may be made, the consent of the State authority having jurisdiction over such plants must be obtained. *Ibid.* Moreover, the Administrator must annually make to Congress a full report of REA's loan activities. 7 U.S.C. 910.

The "all-requirements" provision, which the REA Administrator has required as a condition of the loan to AEC, reflects the fact that the cost of constructing a generating plant and rural electric distribution system would, in general, be too high to be absorbed by a single cooperative. As Senator Norris stated during the original debates of the Act, "It would not be good busi-

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discretion in carrying out the plan I have just suggested. We cannot lay down a hard and fast rule * * *" (80 Cong. Rec. 2759). Senator Norris also stated (80 Cong. Rec. 3308):

> * * * in this proposed legislation we are giving, and we necessarily must give, if we are going to make a success of the measure, in my opinion, almost unlimited discretion, something that under ordinary circumstances I do not like to do. But if the Administrator, whoever he may be, carrying out this proposed law is not at heart converted to the idea embodied in it, namely, to extend the blessings of electricity to the farmers of America, he could easily wreck this whole program and still be technically in the right.

[7] A 1944 amendment increased the self-liquidating period from 25 to 35 years, and changed the rate of interest. 58 Stat. 739.

ness to build a generating system for a single farmers' organization. The expense in such a case would be too high, so that it would not be a self-liquidating proposition. But one generating system may supply half a dozen or a dozen farm organizations * * *." 80 Cong. Rec. 2756. As early as 1938, in order to overcome the lack of feasibility in REA loans to single distribution systems, several of such systems were combined into federated cooperatives such as AEC. Under this plan, the federated cooperatives received REA loans for the construction of a single generating plant and transmission lines designed to supply the member distribution systems with wholesale power which they, in turn, would distribute to their member-consumers.

While the REA loans were made to the federated cooperatives, the individual distribution systems were the member-owners and exercised complete control over the management of the cooperatives; and the REA loans were, in fact, made for the benefit of each of the member distribution systems and their consumers (see Pet. App. 8a). Thus, almost from the inception of the REA program, REA Administrators have consistently insisted that the contracts between the cooperatives and the individual distribution systems contain a provision requiring the distribution systems to purchase their wholesale power requirements from the cooperative during the period of the loan from REA to the cooperative.[8] In short, one

[8] The contracts between the federated cooperatives and their members are for forty-year periods, *i.e.*, the 35-year period of the REA loans plus the additional time necessary for construction of the generating plant and transmission lines.

purpose of the 35-year "all-requirements" provision is to assure REA that each of the distribution systems wants the loan to be made and intends to use its share of the power capacity which the loan would create. Moreover, it has been the consistent view of the REA Administrators that "all-requirements" provisions in contracts between federated cooperatives and their members constitute the principal security and source of repayment of the REA loans to the federated cooperatives (see Pet. App. 7a–9a).[9]

This long-established practice of REA Administrators of requiring "all-requirements" provisions in loan contracts has, for many years, been made known to and acquiesced in by Congress. For example, the complete text of a representative "all-requirements" contract between a federated cooperative and its member distribution systems was inserted into the record of the Hearings before the Senate Subcommittee of the Committee on Appropriations, *Agricultural Appropriations for 1951,* 81st Cong., 2d Sess., pp. 1409–1413 (March 21, 1950). The "all-requirements" arrangements were fully explained by REA during those Hearings (*id.* at 1342 *et seq.*), following which the Conference Committee, in reporting on the agricultural appropriations, stated: "In addition, the Rural Electrification Administration is expected to exercise

[9] At the present time, REA has outstanding approximately one billion dollars in loans to 45 federated cooperatives owning electric generating and distribution facilities in 23 states, which supply wholesale power to about 400 REA-financed rural electric distribution borrowers, whose indebtedness to REA aggregrates approximately another billion dollars.

its power generation authority only in line with its announced policy and the law." H. Rep. No. 2991, 81st Cong., 2d Sess., p. 32. While Congress has long maintained a close scrutiny of the REA policy and practices,[10] so far as we are aware it has never challenged the "all-requirements" provisions.

2. The foregoing discussion demonstrates: (1) that the purpose of the REA Act was to provide loans to stimulate rural electrification; (2) that the Act vests the REA Administrator with broad authority to set terms and conditions for the expenditure of moneys and the security of loans (7 U.S.C. 904); and (3) that the customary and long-established practice of REA Administrators to condition loans upon the making of "all-requirements" contracts was undertaken pursuant to that authority[11] and with the acquiescence

[10] See, *e.g.*, the very extensive examination of REA's generating and transmission loan program which was undertaken by the Appropriation Committees of both Houses in 1963. H. Rep. No. 355, 88th Cong., 1st Sess., pp. 7–8, 35–36; S. Rep. No. 497, 88th Cong., 1st Sess., pp. 27–29.

[11] There are several answers to the contention (Pet. 8) that the REA Administrator acted outside of his authority by making loans for the benefit of persons who were already receiving "central station service" (see 7 U.S.C. 904).

First, it is difficult to see the relevance of the "central station service" restriction to the question whether petitioner may challenge under the antitrust laws the Administrators' insistence upon the 35-year "all-requirements" contracts. Whether particular governmental action comes within the ambit of the antitrust laws depends upon whether *that action*—and not some other action—was within the official's authority.

Second, it has long been settled that a private power company has no standing to challenge the action of the REA Administrator in approving loans where the basis for the challenge is simply that the Administrator has failed to follow the "central station service" restriction in 7 U.S.C. 904. See *Kansas City*

of Congress. In these specific circumstances neither the REA Administrator's imposition of the 35-year requirement in his contract with AEC nor the latter's inclusion of the provision in its contracts with its members violates the antitrust laws.[12] Although AEC and its members are independent entities, realistically the Ad-

Power & Light Co. v. *McKay*, 225 F. 2d 924 (C.A.D.C.), certiorari denied, 350 U.S. 884; *Rural Electrification Admin.* v. *Central Louisiana Elec. Co.*, 354 F. 2d 859 (C.A. 5), certiorari denied, 385 U.S. 815. The continuing vitality of the *McKay* decision was specifically recognized in *Hardin* v. *Kentucky Utilities Co.*, 390 U.S. 1, 7, n. 7.

Third, even if petitioner had standing to urge that the REA Administrator acted beyond his authority because of a violation of the "central station service" restriction and even if this point is relevant to the antitrust contentions, there would still be no basis for holding that the Administrator acted beyond his statutory authority. The Administrator has authority to make loans and to determine whether the statutory requirements for the making of such loans have been met—*e.g.*, whether the loan is for the purpose of bringing "central station service" to unserved persons in rural areas. 7 U.S.C. 904. The most that petitioner can say is that the Administrator erroneously determined, in the particular case, that "central station service" was not being supplied. But administrative officials do not act outside their statutory bounds simply because their determinations are erroneous. See, *e.g.*, *Barr* v. *Matteo*, 360 U.S. 564; *Schilling* v. *Rogers*, 363 U.S. 666, 676–677.

Fourth, the REA Administrator has consistently taken the position in cases such as this that the "central station service" provision prevented only the substitution of REA-financed service for existing service but did not prevent financing to benefit those who, though already served, received service for the first time through REA-financed facilities (R. 224–225, 249–252). See *Kansas City Power & Light Co.* v. *McKay*, 115 F. Supp. 402, vacated on other grounds, 225 F. 2d 924 (C.A.D.C.). See, also, *Comptroller General, Report to the Congress of the United States on REA* (1963).

[12] The official governmental character of the REA Administrator's action is not obviated because the petitioner in its complaint

ministrator's imposition of the 35-year requirement and the implementation thereof by AEC and its members are integrated parts of a single transaction between the government on the one hand and AEC and its members on the other.

Of course, transactions among private persons may violate the antitrust laws even though they implement or are pursuant to a contract that one of such persons has with the government, or are entered into pursuant to some governmental directive. See *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690; *United Mine Workers* v. *Pennington, supra,* 381 U.S. at 671, n. 4. Whether the antitrust laws apply to such private transactions depends upon the latter's role in effectuating a particular statutory and regulatory scheme; as shown above, the specific design of the REA Act shows that the 35-year requirement here is necessary to effectuate the purposes of that Act and, therefore, it cannot be challenged under the antitrust laws.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1968.

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characterized the Administrator's conduct as part of a "conspiracy." See, *e.g.*, *E. W. Wiggins Airways, Inc.* v. *Massachusetts Port Authority*, 362 F. 2d 52, 56 (C.A. 1), certiorari denied, 385 U.S. 947.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 618

ALABAMA POWER COMPANY, *Petitioner*

v.

ALABAMA ELECTRIC COOPERATIVE, INC., a corporation; RURAL ELECTRIFICATION ADMINISTRATION; NORMAN M. CLAPP, Administrator of the Rural Electrification Administration; THE UNITED STATES DEPARTMENT OF AGRICULTURE; and ORVILLE L. FREEMAN, Secretary of the United States Department of Agriculture

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF ALABAMA ELECTRIC COOPERATIVE, INC. IN OPPOSITION TO PETITION FOR CERTIORARI

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF ALABAMA ELECTRIC COOPERATIVE, INC. IN OPPOSITION TO PETITION FOR CERTIORARI

This litigation, seeking to challenge a United States Government program administered by the Rural Electrification Administration, constitutes the latest in a long series of efforts by Alabama Power Company to imperil the stability and to stifle the growth of Alabama Electric Cooperative, Inc.

The loan from the United States to the Cooperative, which Alabama Power Company here seeks once more to attack, was approved by the REA Administrator in October 1961 (R. 224)—more than seven years ago. Since that time Alabama Power Company has endeavored to attack this REA loan before the Alabama Department of Finance, before the Alabama Supreme Court, on several occasions before the Congress,[1] and, finally, before the federal courts. In every instance Alabama Power Company's efforts have been unsuccessful and unpersuasive.

The reasons given in Alabama Power Company's petition for certiorari for still further prolonging this controversy are wholly lacking in substance. Their insufficiency to warrant a grant of certiorari is amply

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[1] See, in particular, the testimony of Alabama Power Company's president in Hearings before House Committee on Agriculture, on H.R. 10010, Food and Agriculture Act of 1962, Serial AA, Part 2, pp. 677-713, 87th Cong., 2nd Sess. (March 6, 1962), and in the following Hearings before Agriculture Subcommittee of the House Committee on Appropriations, on Department of Agriculture Appropriations: For 1963, Part 5, pp. 247-271, 87th Cong., 2nd Sess. (March 22, 1962); for 1964, Part 5, pp. 373-381, 88th Cong., 1st Sess. (April 2, 1963); for 1965, Part 5, pp. 295-311, 88th Cong., 2nd Sess. (April 9, 1964). On the Senate side, see also the testimony of Alabama Power Company's president in Hearings before Senate Committee on Agriculture and Forestry, on S. 2786, Food and Agriculture Act of 1962, pp. 660-694, 87th Cong., 2nd Sess. (February 28, 1962), and in the following Hearings before Agriculture Subcommittee of the Senate Committee on Appropriations, on Department of Agriculture Appropriations: For 1962, on H.R. 7444, pp. 902-906, 87th Cong., 1st Sess. (May 11, 1961); for 1963, on H.R. 12648, pp. 1047-1070, 87th Cong., 2nd Sess. (March 1, 1962); for 1964, on H.R. 6754 (Rural Electrification Administration), pp. 135-142, 244-246, 330-332, 88th Cong., 1st Sess. (April 4, 1963); for 1965, on H.R. 11202, Vol. II, pp. 247-282, 88th Cong., 2nd Sess. (June 30, 1964).

demonstrated by the Government's brief in opposition. A few supplemental comments from the Cooperative may also be helpful to the Court.

1. There is no conflict of decisions, and petitioner's claims of conflict are spurious.

Petitioner asserts (Petition, pp. 24-30) a conflict with *Hardin* v. *Kentucky Utilities Co.*, 390 U.S. 1. But this Court's opinion in *Hardin* shows on its face exactly the opposite. Footnote 7 in *Hardin* (390 U.S. at 7) expressly distinguishes, from the situation there considered, the line of decisions exemplified by *Kansas City Power & Light Company* v. *McKay*, 96 U.S. App. D.C. 273, 225 F.2d 924 (1955), certiorari denied, 350 U.S. 884, which held that under the REA legislation an alleged competitor claiming injury does not have standing in court to challenge an REA loan, and that the remedy, if any, is with Congress rather than the courts. Thus *Hardin* itself explicitly recognizes that the *Kansas City* doctrine was left wholly intact, and that if petitioner feels that the REA Administrator exceeded his statutory authority by making this Government loan and by insisting on 35-year all-requirements contracts to provide adequate security for the United States, then petitioner should address its complaint to Congress instead of the courts. Moreover, the question at issue in *Hardin* was a special territorial limitation imposed on the TVA by Congressional amendment of the TVA Act—legislation in no way involved here. The Court found (390 U.S. at 6-7) in the legislative history of that TVA Act amendment a clear Congressional purpose to confer on private utilities the standing to protect themselves in court from TVA competition—again, circumstances

which are wholly absent here and which present a matter of statutory interpretation entirely different from what is involved in the well-established interpretation of the REA legislation.

Petitioner's other claims of conflict turn out to be even more remote and far-fetched. Thus the claim (Petition, pp. 20-24) of conflict with the District of Columbia Circuit's subsequent decision in *City of Paris* v. *Federal Power Commission,* — U.S. App. D.C. —, — F.2d —, Docket No. 21375, decided July 3, 1968, evaporates on inspection of that decision. *City of Paris* held that an REA-financed cooperative is not an "instrumentality" of the United States within the particular definition set forth in Section 201(f) of the Federal Power Act, 16 U.S.C. § 824(f), and accordingly that the "instrumentality" exemption in Section 201(f) would not by itself justify the Federal Power Commission's refusal to take jurisdiction when such a cooperative asks that the Commission direct an investor-owned utility to interconnnect with the cooperative so as to make possible a wheeling arrangement for delivering energy to one of the cooperative's customers. Obviously such definitions of terms as used in the Federal Power Act have not the slightest applicability to the present case. Moreover, the extent of Federal Power Commission jurisdiction over REA-financed cooperatives is a matter having its own complex background of legislative and administrative history—all discussed extensively by the District of Columbia Circuit both in *City of Paris* and in its earlier opinion in *Salt River Project Agr. Dist.* v. *Federal Power Comm.,* — U.S. App. D.C. —, 391 F.2d 470 (1968), certiorari denied sub nom. *Arkansas Valley G. & T., Inc.* v. *F.P.C.,* No. 184, October 14,

1968. Such questions, involving the scope of particular Federal Power Act provisions, do not arise directly in the present case, nor do they even bear any visible relationship to the issues here. Indeed, in *City of Paris* (slip opinion, p. 6) the District of Columbia Circuit went out of its way to point out—what must in any event be obvious—that "while an entity may be considered a government instrumentality for certain purposes, it need not be so considered for all purposes", and that "We hold here simply that East Kentucky, as an REA-financed cooperative, is not a government instrumentality for purposes of the Section 201(f) exemption in the Federal Power Act."

Finally, petitioner's claim (Petition, p. 31) of conflict with *Harman* v. *Valley National Bank of Arizona*, 339 F.2d 564 (9th Cir. 1964), and *Bankers Life and Casualty Company* v. *Larson*, 257 F.2d 377 (5th Cir. 1958), certiorari denied, 358 U.S. 879, is entirely wide of the mark. *Bankers Life*, being an earlier decision of the Fifth Circuit, would not give rise to a conflict of circuits even if it were incompatible with the Fifth Circuit's decision here. But in fact there is no inconsistency at all; in *Bankers Life* the Fifth Circuit merely held that a state insurance commissioner was not immune in a civil suit under the federal antitrust laws if his acts, instead of being acts for the purpose of carrying out his official duties under state law, were personal acts done as a part of a conspiracy against the plaintiff (257 F.2d at 380-381). In *Harman* the Ninth Circuit made it clear that the allegation in the complaint that the other defendants sought to influence the state attorney general was but one element in a larger long-continued conspiracy sufficiently alleged in the complaint, and hence that the complaint had

sufficient other allegations to state a cause of action (339 F.2d at 566). Neither *Bankers Life* nor *Harman*, moreover, involved efforts to use the federal antitrust laws as a vehicle for challenging United States Government programs. Nor did they involve any question, as here, of interpreting the antitrust laws in a manner which would make them harmonious with other federal statutes such as the REA legislation.

2. Thus petitioner's claim of conflict of decisions collapses. But more than that, petitioner has not shown that pending litigation exists in any other federal court of appeals—or for that matter, even in any other federal district court—which involves the same or a similar question.

3. In any event, the decision below is in full accord with principles expressed in decisions of this Court. E.g., *Eastern R. Conf.* v. *Noerr Motors*, 365 U.S. 127, 136-137; *Mine Workers* v. *Pennington*, 381 U.S. 657, 671-672; *Parker* v. *Brown*, 317 U.S. 341, 350-352; see also *E. W. Wiggins Airways, Inc.* v. *Massachusetts Port Auth.*, 362 F.2d 52, 55-56 (1st Cir. 1966), certiorari denied, 385 U.S. 947. The 35-year contracts which REA required the Cooperative to obtain in order to provide the United States adequate security for this loan (R. 226-227)—which are the contracts petitioner complains of—are the clearest embodiment of the kind of "governmental action" which such decisions have consistently held not to be within the scope of the prohibitions of the federal antitrust laws.

4. The REA's insistence on such 35-year all-requirements contracts in connection with REA loans to cooperatives for generating facilities not only has been a matter of common knowledge; it has been expressly

brought to the attention of Congress, first by REA itself [2] and then by REA's critics such as petitioner.[3] And having received detailed knowledge on the subject, Congress from year to year continued to appropriate loan funds to REA without restrictions in this respect. On a number of occasions Congress also has rejected proposals either to limit REA's authority with respect to generation loans or to subject the REA Administrator's loan-approval discretion to a review by the Federal Power Commission or by others.[4]

Moreover, in connection with 1964 appropriations, the Appropriations Committees of both Houses made an extensive examination of the REA generation and transmission loan program, as a result of which the Committees suggested detailed procedural changes in REA's processing of loan applications.[5] It is noteworthy that none of those suggestions contained the slightest indication of Congressional dissatisfaction with the REA's imposition of 35-year all-requirements contracts.

5. The Fifth Circuit's decision here is soundly rooted in the express provisions of the Rural Electrification Act and its legislative history, in the distinctive character of the Federal Government's rural elec-

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[2] See, for example, Hearings before Agriculture Subcommittee, Department of Agriculture Appropriations for 1951, Senate Committee on Appropriations, 81st Cong., 2d Sess., pp. 1409-1413.

[3] See note 1, supra.

[4] See, for example, 92 Cong. Rec. 1799-1817 (1946); 92 Cong. Rec. 1571 (1946); 93 Cong. Rec. 2423 (1947); and, for certain of the more recent proposals, see the materials cited in note 1, supra.

[5] H. Report No. 355 and S. Report No. 497, 88th Cong., 1st Sess. (1963).

trification program and of the REA borrowers, and in the particular economics of the REA-financed generation of electric power. It is well known that, from the outset of the REA program, the generation and transmission loans made by REA have been the subject of vigorous, hostile attacks by investor-owned power companies. If the 35-year contracts imposed by REA were to be held subject to question under the federal antitrust laws, then the cooperatives would face the prospect of treble-damage suits and other extensive litigation from investor-owned utilities anxious to impede the REA program. Defense of such litigation would alone be a heavy burden for these cooperatives. Indeed, the ability to harass the cooperatives by long-drawn-out pretrial, trial and appellate proceedings would by itself present virtually irresistible attractions, no matter how lacking in merit the case might be. Such litigation would impede and disrupt the sound operations of the cooperatives and seriously set back the federal rural electrification program—a result exactly the opposite of what Congress intended.

Illustrative are some of the facts which are in the background of this case. They underscore even further the otherwise compelling reasons for denying certiorari.

In Alabama there are two utility systems (apart from the TVA) engaged in generating and transmitting electric energy. The first, Alabama Power Company, is a subsidiary of The Southern Company (a registered holding company) and an integral part of The Southern Company System. The second, Alabama Electric Cooperative, is an REA-financed cooperative obtaining its principal capital funds by loans

from the United States and carrying on its activities in accordance with the numerous requirements which REA imposes on it.

Alabama Power Company is many, many times larger than Alabama Electric Cooperative. For example, in 1964 Alabama Power Company had a maximum system demand of over 2.8 million kilowatts, and sold over 13 billion kilowatt hours, bringing in revenues of over $156,000,000; and at the end of 1964 it had a total electric plant investment of over $825,000,000, plus its $74,000,000 one-half interest in Southern Electric Generating Company.[6] It also conducts vast annual construction programs.[7] Alabama Electric Cooperative, on the other hand, in 1964 had a maximum demand of only 79 thousand kilowatts and sold only about 378 million kilowatt hours, bringing in electric energy revenues of only about $3,100,000; and at the end of 1964 it had a total electric plant investment of just under $19,000,000.

Despite this tremendous disparity in size, and despite the fact that its efforts to challenge this REA loan to the Cooperative have been rebuffed in one forum after another, Alabama Power Company did manage to prevent any of the REA loan funds from being received by the Cooperative for a period of nearly five years. At first it was able to do this by the

[6] Such statistical data, as well as the comparable data for Alabama Electric Cooperative, are readily available from the annual report forms which constitute public records of the Federal Power Commission. See also R. 230-231.

[7] Thus in a recent filing with the Securities and Exchange Commission, Alabama Power Company stated that its 1968 construction program is estimated at $83,951,000. SEC Holding Company Act Release No. 16168, dated September 19, 1968.

voluminous and time-consuming nature (R. 78-80) of the challenge which it sought to make to the REA loan in hearings before the Alabama Department of Finance (which under Alabama law was required to approve the Cooperative's issuance of any notes to the United States for the REA loan funds). When the Department of Finance granted such approval on January 9, 1963 (R. 80), Alabama Power Company thereupon took the matter to the state courts and obtained a "temporary" restraining order. The Alabama Supreme Court decision against Alabama Power Company was rendered on September 10, 1964; Alabama Power Company's first application for rehearing was denied by the Alabama Supreme Court on April 8, 1965 (R. 81-82). The following day, April 9, 1965, Alabama Power Company began the present federal court suit. Alabama Power Company also filed a second application for rehearing in the Alabama Supreme Court (R. 81), which was denied on June 30, 1965.[8] This event finally brought about the termination of the "temporary" restraining order so that the long-delayed REA loan to the Cooperative could at last proceed. But as the chronology shows, Alabama Power Company meanwhile had been able to accomplish a delay of nearly five years in the start-up of this Government-sponsored project.

This background provides a persuasive addendum to the already compelling reasons why this Court should end this litigation, once and for all, by denying certiorari.

The Court of Appeals wisely observed: "If the security which the Administrator requires can be un-

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[8] *Alabama Electric Cooperative* v. *Alabama Power Co., Inc.*, 278 Ala. 123, 176 So. 2d 483 (1965).

dercut and the borrower mulcted in treble damages for complying with the condition imposed by the Administrator for making the loan, then the functioning of the Act will be crippled, if not defeated" (394 F.2d at 677; Petition, p. 10a). Petitioner's undue prolongation of this controversy has already succeeded in bringing the matter much too far in such a direction. The time for this litigation to be terminated is now.

CONCLUSION

For the foregoing reasons, in addition to the reasons stated by the Government, the petition for certiorari should be denied.

Respectfully submitted,

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Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Two briefs have been filed in opposition to the petition for the writ of certiorari sought herein.

The brief on behalf of respondents Rural Electrification Administration, Norman M. Clapp, United States Department of Agriculture and Orville L. Freeman (hereinafter referred to as the government's brief) embraces an attempt to restate in the form of a single question (p. 2) the questions presented to this Court and in so doing the government's brief fails to focus on the several questions actually presented by this petition for writ

of certiorari. Thus the question as stated by the government's brief skirts the important question as to whether petitioner has standing under Section 16 of the Clayton Act (15 U.S.C. § 26) to sue Alabama Electric Cooperative, Inc. (a private, non-Governmental party) to enjoin its violations of the federal antitrust law by entering into the 35-year, all-requirements contracts. Moreover, the government's brief does not even cite, much less attempt to explain why such section does not confer upon petitioner standing to maintain the suit filed in the District Court below. Likewise, the government's brief passes over other questions put to the court by the petition for writ of certiorari and contains a too selective statement of facts which neatly sets the stage for the government's argument but fails fairly to put the facts in perspective. Thus, the government's brief, in characterizing the respondent, Alabama Electric Cooperative, Inc., as a federated cooperative "composed primarily of several member distribution cooperatives" which will distribute power to "consumers in rural areas of Alabama," fails to disclose (a) that such Cooperative at the time of making the contracts complained of was serving at wholesale six municipalities, each with considerably more than 1,500 inhabitants, and two large textile plants located in one of such municipalities (R. 93, 130, 131, 132) and (b) that the generating plant and more than 700 miles of high voltage transmission lines to be constructed with the $20,350,000 loan from the Rural Electrification Administration (REA) *were not* to be used to extend service to persons "in rural areas who are not receiving central station service," but that such facilities *were* to be used to displace existing "central station service"

being supplied at reasonable rates[1] by petitioner in Alabama and Gulf Power Company in Florida (R. 7, 8, 131, 252, 253, 271, 272, 273, 288).

The statement in the government's brief also fails to point up the ambitious expansion plan adopted by Alabama Electric Cooperative, Inc., to extend its facilities to the greater portion of the State of Alabama and northwest Florida in duplication of existing facilities of petitioner and Gulf Power Company and that the 35-year, all-requirements contracts constitute the device to assure a market for the power to be delivered from such facilities (R. 12, 20, 292, 293, 294, 296, 297, 298). In particular, such statement fails to recognize the allegations in petitioner's complaint to the District Court below that the facilities to be constructed with the $20,350,000 loan are merely the first step in a long-range plan to take over and duplicate service now being rendered by petitioner to wholesale customers located throughout the State of Alabama (R. 293).

The brief filed on behalf of respondent Alabama Electric Cooperative, Inc., (p. 9) draws on statistical data contained in

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[1] See *Alabama Electric Cooperative, Inc. v. Alabama Power Company*, Federal Power Commission Opinion No. 533, Docket No. E-7183, November 8, 1967, 71 P.U.R. 3d 209, 216, where the Commission found petitioner's uniform wholesale rates to electric cooperatives which return less than 6 per cent *not* to be unreasonable. Also see transcript of Hearings before Agriculture Subcommittee, Department of Agriculture Appropriations for 1969, House Committee on Appropriations, 90th Cong. 2d Sess., pp. 424-427, where it was shown that the rates of Alabama Electric Cooperative, Inc., to the distribution cooperatives it serves are 50 per cent higher than the rates (approximately 6 mills per kilowatt hour) from petitioner. There it was also shown that Alabama Electric Cooperative, Inc., with REA approval, was in the process of giving its wholesale customers a 10 per cent reduction in rates as the result of an arrangement (a) whereby REA granted a moratorium on principal and interest payments on its REA loan and (b) certain distribution cooperatives which purchase their power requirements from petitioner will contribute to Alabama Electric Cooperative, Inc., one-half mill per kilowatt hour on all power purchased by them from petitioner.

the records of the Federal Power Commission and filings with the Securities and Exchange Commission to point up the relative sizes of petitioner and such Cooperative and paints a picture (not borne out by the record) of petitioner as a large, overpowering utility which has sought to "imperil the stability and to stifle the growth of Alabama Electric Cooperative, Inc.," (p. 1). The brief of Alabama Electric Cooperative, Inc., makes further excursions outside the record and charges (p. 8) that "[i]t is well known that, from the outset of the REA program, the generation and transmission loans made by REA have been the subject of vigorous, hostile attacks by investor-owned power companies" and concludes that cooperatives should not be required to "face the prospect of treble damage suits" because of the heavy burden the defense of such suits would be to the cooperatives. We are sure this court will be surprised to hear that the antitrust laws should not be enforced because enforcement would create a burden for those who violate the laws. We believe the injuction and treble-damage provisions as well as the criminal provisions of the antitrust laws were *intended* to create a burden on those who would violate such laws. We also suspect that this court will be surprised to hear that one charged with a violation of these laws is to be excused because the complaining petitioner is larger and more powerful.[2] Standing to sue under Section 16 of the Clayton Act does not depend upon the relative size of the complainant.

The brief of Alabama Electric Cooperative, Inc. (pp. 9, 10), purports to trace the history of litigation before the Alabama State Department of Finance and the state court review of that

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[2] Yet even the brief of the government (footnote 9, page 10) points up the vast amount of loans (approximately one billion dollars) made by REA to federated cooperatives such as AEC.

agency's action in approving the $20,350,000 loan. However, it fails to disclose that the Alabama Supreme Court, like the District Court and the Fifth Circuit below, declined to pass on the validity of the REA loan (R. 192). The antitrust question presented here was not raised in the state litigation. In any event, the attempt by petitioner to exhaust its other administrative and judicial remedies is no reason to deny its standing to sue in the federal courts for enforcement of rights afforded it under the antitrust laws.

The argument submitted by petitioner along with its petition for writ of certiorari (pp. 24-30) states the basis for petitioner's reliance on *Hardin v. Kentucky Utilities Company*, 390 U.S. 1, 19 L.Ed.2d 787. Neither of the briefs filed in opposition to the petition herein shows why the doctrine applied by this Court in *Hardin* should not be applied in this case. Both of such briefs rely upon the footnote reference (Note 7) by this Court in *Hardin* to *Kansas City Power & Light Company v. McKay*, 96 U.S. App. D.C. 273, 225 F.2d 924 (C.A. D.C. Cir.), cert. denied, 350 U.S. 884, 100 L.ed. 780, 76 S.Ct. 137 (1955) as supporting their position; however, this Court clearly pointed out in *Hardin* that the government's reliance on Kansas City was "misplaced." In *Hardin*, just as in this case, the standing to sue was predicated on a statute concerned with "protecting competitive interests" and this Court held that in such a case the "long established rule" is that an "explicit statutory provision" was not necessary to confer standing. However, here petitioner relies not only upon the substantive provisions of the antitrust statute which are designed to protect competitors, but also Section 16 of the Clayton Act which expressly authorizes the suit initiated in the District Court below. Moreover, while this Court did decline to grant the petition for writ of certiorari in *Kansas City*, this

Court has never held that the "central station service limitation" contained in Section 4 of the Rural Electrification Act of 1936, 7 U.S.C. 904, was not also designed to protect the competitive interest of existing electric suppliers. In any event, the REA Administrator could not be taking "valid Governmental action" if he were failing to comply with the central station service limitation.

The reliance by the opposition briefs on *Parker v. Brown*, 317 U.S. 341, is likewise misplaced. The quote in the government's brief (p. 5) from *Parker* points up that this Court held there that nothing in the language of the Sherman Act or in its history suggests that its purpose was to restrain a state or its officers or agents from "activities directed by its legislature." Petitioner here contends that the activities of the respondents in this case were *not* directed by any legislature but, on the contrary, are in violation of the legislative directions.

With respect to *Eastern Railroad Presidents Conference v. Noerr*, 365 U.S. 127, 136 (1961), relied on by respondents and discussed on page 32 of the petition herein, this Court will note the many significant distinguishing features of that case from the one here and note in particular that in this case the complainant alleges trade restraints by individuals and further that the participation by the governmental defendants in the restraint of trade involved is not the result of valid governmental action.

CONCLUSION

For the reasons set forth in the petition for a writ of certiorari, such petition should be granted.

Respectfully submitted,

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